Supreme Court, U.S.
FILED
APR 14 1998
OFFICE OF THE CLERK

No. 97 2002

In The

Supreme Court of the United States

October Term, 1997

◆

ROBERT F. COLEMAN and SANTA CLARA COUNTY TAXPAYERS' ASSOCIATION, a corporation,

Petitioners,

v.

THE SANTA CLARA COUNTY OPEN SPACE AUTHORITY,

Respondent.

◆

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Sixth Appellate District

◆

PETITION FOR WRIT OF CERTIORARI

◆

JOHN H. FINDLEY
Counsel of Record
ZUMBRUN & FINDLEY
2150 River Plaza Drive
Suite 255
Sacramento, CA 95833
(916) 641-0015

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a statute that provides for notice of a hearing by a public entity for the levy of a special benefit assessment by publication only in compliance with the requirements of due process of law as provided in Article XIV, Section 1, of the Amendments of the Constitution of the United States, where the interests, names and addresses of the property owners affected by such special assessment were known by and readily available to said public entity?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT AS TO JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 7

LEGISLATIVE VS. ADJUDICATIVE ACT IN MAKING THE LEVY 8

BI-METALLIC 14

THE *WISCONSIN ELECTRIC* PER CURIAM 16

CONCLUSION 26

LIST OF PARTIES

Petitioners include Robert F. Coleman and Santa Clara County Taxpayers' Association, a corporation.

Respondent is the Santa Clara County Open Space Authority.

TABLE OF AUTHORITIES

Page

CASES

Bi-Metallic v. Colorado, 239 U.S. 441 (1915) 9, 14, 15, 16

Blankenburg v. City of Northfield, 462 N.W. 2d 417 (1990) 24, 25

Cypress Creek Farms v. L'Anguille Improvement District No. 1, 626 S.W. 2d 357 (Ark. 1982) 25

Fuentes v. Shevin, 407 U.S. 67 (1972) 9

Meadowbrook Manor, Inc. v. City of St. Louis Park, 258 Minn. 266, 104 N.W.2d 540 (1960) 17, 19, 20, 21, 25, 27, 28

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 3, 13, 14, 21, 26

New York v. New York, N.H. & H.R. Co., 344 U.S. 293 3

Singking Fund Cases, 99 U.S. 761 (1878) 10, 11

Walker v. City of Hutchinson, 352 U.S. 112 (1956) .. 22, 23

Wisconsin Electric Power Co. v. City of Milwaukee, 352 U.S. 948 (1957) .... *passim*

Wulzen v. Board of Supervisors, 101 U.S. 15 (1894) 10, 11

CONSTITUTION

Article XIV, Section 1, of the Amendments of the Constitution of the United States i

STATUTES

28 U.S.C. § 1257 2

Government Code § 54954.6 .... 2, 3, 7, 26

TABLE OF AUTHORITIES

Page

Pub. Res. Code § 35100 et seq. 4

§ 35120.............................. 5

Sts. & High. Code § 22500, et seq............. 4, 5, 14

§ 22593.......................... 5

MISCELLANEOUS

McQuillan, Municipal Corporations, 3rd Ed., Sec. 38.98 23

RULES

Rule 14 of the Rules of the Supreme Court Of The United States.................................. 5

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court Of Appeal Of The State Of California Sixth Appellate District entered on October 20, 1997, since that decision has decided an important federal question in a way that conflicts with relevant decisions of this Court.

◆

OPINIONS BELOW

The opinion of the Court of Appeal Of The State Of California Sixth Appellate District is an unpublished opinion and is not included in the official reports of the State of California and, accordingly, is attached hereto as Appendix "A". The denial of the Writ of Certiorari by the Supreme Court of the State of California in this cause is attached hereto as Appendix "B". The summary judgment of the Superior Court of Santa Clara County is attached hereto as Appendix "C".

◆

STATEMENT AS TO JURISDICTION

In compliance with Rule 14 of the Rules of the Supreme Court of the United States, Petitioner submits herewith its statement as to the basis upon which the Court has jurisdiction to review the judgment of the Superior Court in and for the County of Santa Clara, the affirmation of said judgment by the Court of Appeal Of The State of California Sixth Appellate District entered in this cause and the denial of Petitioners' Writ of Certiorari for review to the Supreme Court of the State of California, which judgment, affirmation and denial resulting in a judgment and decision that have decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners' action in the first cause of action in its First Amended Complaint filed on August 19, 1994 sought to have certain provisions of the Government Code Section 54954.6 of the State of California found to provide for an unconstitutional method of notice of the assessment levy and, accordingly, the special benefit assessment levied pursuant thereto be declared null and void.

On September 25, 1995, the Superior Court in and for the County of Santa Clara filed its summary judgment that finally disposed of all issues between the parties including the denial of relief prayed for in Petitioner's first cause of action.

The Petitioner timely appealed to the California Sixth District Court of Appeal and that court affirmed the judgment of the Superior Court in an unpublished opinion dated October 20, 1997. Petitioner's timely request for a rehearing was denied on November 7, 1997 by the Court Of Appeal, Sixth Appellate District (Appellate Court). The Petitioner made a timely petition to the Supreme Court of California for a Writ of Certiorari and that Court's denial of the petition was entered on January 14, 1998.

The jurisdiction of the Supreme Court to review under these circumstances is conferred by Title 28 United States Code, Section 1257. The following cases sustain the jurisdiction of the Supreme Court to review the aforesaid judgment and decision on direct appeal: *Mullane v. Central Hanover B. & T. Co.,* 339 U.S. 306: *New York v. New York, N.H. & H.R. Co.,* 344 U.S. 293.

◆

STATUTES INVOLVED IN THIS CASE

California Government Code Section 54954.6 (c) (4) as amended by S.B. 376 On October 11, 1993, specifically exempted the Santa Clara County Open Space Authority from providing mailed notice to property owners of the levy of benefit assessments and allowed notice solely by publication. The Section 54954.6 is set in full forth in Appendix "D" hereto. The relevant portions of Subdivisions (b) and (c) of Section 54954.6 are as follows:

> "(b)(1) The joint notice of both the public meeting and the public hearing required by subdivision (a) with respect to a proposal for a new or increased general tax shall be accomplished by placing a display advertisement of at least one-eighth page in a newspaper of general circulation for three weeks pursuant to Section 6063. . . .
>
> "(c)(1) The joint notice of both the public meeting and the public hearing required by subdivision (a) with respect to a proposal for a new or increased assessment on real property shall be accomplished through a mailing, postage prepaid, in the United States mail and shall be deemed given when so deposited. The public meeting pursuant to subdivision (a) shall take place no earlier than 10 days after the joint

> mailing pursuant to this subdivision. The envelope for the cover of the mailing shall include the name of the local agency and the return address of the sender. This mailed notice shall be in at least 10-point type and shall be given to all property owners proposed to be subject to the new or increased assessment by a mailing by name to those persons whose names and addresses appear on the last equalized county assessment roll or the State Board of Equalization, as the case may be.
>
> (2)
>
> (3)
>
> (4) Notwithstanding paragraph (1), in the case of an assessment to be levied pursuant to Part 2 (commencing with section 22500) of Division 2 of the Streets and Highways Code by a regional park district, regional park and open-space district, or a regional open-space district formed pursuant to Article 3 (commencing with Section 5500) of Chapter 3 of Division 5 of, or pursuant to Division 26 (commencing with Section 35100) of, the Public Resources Code, notice may be provided pursuant to paragraph (1) of subdivision (b)."

The above provisions mandate notice by mail with respect to all benefit assessment levies against private property with the express exception for notice solely by publication (consistent with the notice for a general tax) for a regional open-space district formed pursuant to Section 35100 et. seq. of the Public Resources Code levying a benefit assessment pursuant to Section 22500 et. seq. of the Streets and Highways Code.

◆

STATEMENT OF THE CASE

In this action the petitioners are challenging the validity of the assessment lien levied by the respondent, Santa Clara County Open Space Authority (OSA or "Authority"), on numerous properties in private ownership located in a simultaneously formed assessment district.

Authority was created, effective February 1, 1993, under California Public Resources Code Section 35120. On April 26, 1994, Authority adopted a Resolution of Intention 94-7 to order the formation of an assessment district and the levy of the assessment against private property within the proposed district pursuant to Section 22500 et seq. of the Streets and Highways Code (Landscape and Lighting Act or LLA). Notice of the public meeting and protest hearing set for June 27 and July 6, respectively, was done by publication in the San Jose Mercury News on May 16, May 23, and May 30, 1994 (An example is in Appendix E.) No notice was given by mail to any affected property owner. The assessments were being levied under the provisions of the California Streets and Highways Code sections 22500 et seq. wherein the proceedings are automatically abandoned if written protests are filed by property owners owning more than fifty percent of area of assessable lands within the proposed district (section 22593.)

The Authority conducted a protest hearing on July 20, 1994. Shortly before this hearing deadline, when Petitioners learned that property owners were not to receive written notice of the assessment, it mailed out notification to the owners of the largest parcels in the county in an effort to obtain a fifty percent protest by area, which property owners represented less than three percent of the total number of property owners in the proposed district. No protests were submitted as a result of the Authority's published notices. But over thirty-five hundred protests were submitted in writing as a result of Petitioner's mailing effort that represented over 130,000 acres. But at the hearing on July 20, 1994, the Authority declared invalid all but 2,032 of the protests and found that the protest was 21.3% (representing 39,245.06 acres) and, accordingly, failed to reach the fifty percent threshold for automatic abandonment. The Authority then immediately adopted resolution 94-8 (Appendix F) to form Assessment District 94-1 and levy the assessment against 294,859 parcels in the district. (Appendix G contains the Authority's Protest Summary.)

Petitioners had less than one week prior to the July 20, 1994 protest hearing to send out mailed notice to approximately three percent of the property owners. To this day approximately 97% of the property owners now paying the assessments levied on their property still have no idea that they once had a protest right that died with a deadline in July 1994. It is this 97% of the property owners that were denied their due process guarantees. This group of individuals includes many members of the Santa Clara County Taxpayers' Association (SCCTA) since the petitioners, with the limited time and resources in this situation, focused on large landowner in an effort to achieve a successful protest and not on SCCTA members who primarily live on small urban lots. The lack of mailed notice by the Authority to these property owners was plead in Petitioners' First Amended Complaint in Paragraph 1 as follows:

> "1. At all times herein mentioned, SCCTA was and now is: a) a non-profit public benefit corporation, duly organized and existing under the laws of the state of California; (b) comprised of several hundred taxpayers in the County of Santa Clara, State of California, . . . including members owning real property assessable, potentially assessable or actually assessable subject to the payment of the assessment improperly levied as hereinafter alleged . . . as well as members who, due to the improper and ineffectual notice by publication have, to date, received no notice of the assessment proceedings and resolutions of the Authority in denial of their rights to due process; . . . "

As stated above the Respondent Authority did not provide mailed notice to anyone and provided notice solely by publication pursuant to Government Code Section 54954.6 (c) (4) that had been amended by the California Legislature the previous October to expressly deny Santa Clara County property owners mailed notice of the benefit assessment to be levied against their property by the Authority.

◆

REASONS FOR GRANTING THE WRIT

This court last addressed the applicability of due process in notice requirements for the levy of a benefit assessment in 1956 in its Per Curiam opinion in *Wisconsin Electric Power Company v. City of Milwaukee,* 352 U.S. 948, 1 L.Ed.2d 241, 77 S. Ct. 324. There this Court found that the act of levying an assessment without mailed notice to affected property owners violated due process guarantees.

There the plaintiff, Wisconsin Electric, had not received mailed notice of the time and place of the hearing where the city would levy the assessment on affected property owners. The only notice provided to property owners were published notices in a local newspaper.

The central issue on the notice question in the present matter is whether the Court of Appeal was correct in its conclusion that a requirement of notice of a special assessment turns on whether the act of the public entity in levying the assessment is a legislative act or, alternatively, a judicial act. The court rejected petitioner's contention that a higher level of notice is required for special assessments, holding, "there are no constitutional due process notice requirements when an action is legislative." (Opinion at 26-27, Appendix A.)

LEGISLATIVE VS. ADJUDICATIVE ACT IN MAKING THE LEVY

The Appellate Court at pages 23 through 35 addresses the issue of "constitutionality" raised by Appellant's first cause of action. The analysis that follows covers two distinct topics: whether a "significant property interest" obtains in the instant matter which is adversely affected by the actions of the public entity such that due process protection is triggered; and, secondly, whether the act of the public entity in levying an assessment against private property in this situation was a legislative act or, alternatively, a judicial act.

The Appellate Court cites *Fuentes* (*Fuentes v. Shevin* [1972] 407 U.S. 67) as to what constitutes a significant property interest. This case involved a stove and stereo which cost $500 and Mrs. Fuentes had paid all but $200 when a dispute arose and Firestone attempted to repossess them. This case is cited as representing what is a "significant property interest". Fuentes had an interest of $300 in the items in question. In the instant matter a $12 per annum assessment on single-family property for servicing thirty-year bonds is an interest of $360. If Fuentes had a significant property interest in $300 it would seem that each home owner likewise has a significant property interest when the amount involved is $360 (and some individual parcels are subject to a levy amounting to $9000 over 30 years). This, however, is not the focus of the Appellate Court's analysis. The central issue is whether the levy of the assessment on the many parcels in the assessment district constituted a legislative or a judicial act.

The Appellate Court states (page 24) the difference between legislative and adjudicative actions was first described by this Court in *Bi-Metallic*. The following is a portion of the Justice Holmes' opinion that was quoted:

> "Where a *rule of conduct* applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The constitution does not require all public acts to be done in town meeting or an assembly of the whole. *General statutes* within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way they

> can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . " (Emphasis added.) (239 U.S. 441)

However, this case was hardly the magnum opus on the subject. The following language from the 1878 *Sinking Fund Cases* has been cited on more than one occasion:

> "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. *Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one,* and not the proper exercise of legislative function." (Emphasis added.) *Sinking Fund Cases* 99 U.S. 761 (1878.)

As stated in *Wulzen* in 1894 (*Wulzen v. Board of Supervisors,* 101 Cal. 15, 24):

> "*A legislative act* is said to be one which predetermines what the law shall be *for the regulation of future cases falling under its provisions,* while a judicial act is a determination of what the law is in relation to some existing thing done or happened. (*Mabry v. Baxter,* 11 Heisk. 690; *Sinking Fund Cases,* 99 U.S. 761.)" (Emphasis added.)

The act in question here is Ordinance 94-8 adopted by the Authority on July 20, 1994 (Appendix F) which states:

> "NOW, THEREFORE, BE IT RESOLVED THAT

3. The assessments for Fiscal Year 1994-1995 and method of assessment in the Engineer's Report are hereby approved and said assessment are hereby levied."

Is this a legislative or judicial act?

Under the guidance of the Sinking Funds language isn't this an act that determines an obligation of a sum certain to be imposed on each of the individual parcels of property owners?

Could placing a lien of $12 a year for thirty years on a privately owned parcel of property be considered a "general statute" or a "rule of conduct" under the language of Justice Holmes?

Is it, following the *Wulzen* formula, an act for the regulation of future cases falling under its provisions? The lien here is the result of the application of prior legislative acts to specific, individual parcels of land owned by private parties. The Engineer's report was previously approved by the Authority in Resolution 94-6 dated April 14, 1994 (Appendix H) and resolution 94-7 dated April 26, 1994, (Appendix I).

The Engineers' Report in SECTION VI, ASSESSMENT ROLL, references Appendix A comprised of large notebooks wherein the exact dollar amount of the proposed levy on each of the individually identified parcels is specified. Thousands of parcels are definitively and specifically identified by reference to an assessor's parcel number assigned to each individual lot or parcel. SECTION V of the Engineers' Report set forth the method of apportionment of the assessment. It is in this adopted and approved report where the Authority made discretionary findings of what the relative benefit was to the various or types of property in the assessment district that fell into certain classifications. Basically, it determined that single family dwellings would be assessed $12 per year, multi-dwelling units a higher rate and some businesses up to $300 per year. There was a determination by Authority that ranch and agricultural properties would be assessed nothing since already being open space they would not benefit from open space acquisitions by Authority. These acts were legislative. They *prescribed the rule to be applied in the future for the levy* against the various types or classes of properties which, at the protest hearing, would allow the Authority to hear objections by property owners as the applicability of the designation by Authority of their property as a particular type. Authority could then make a judgment as to whether to change the assessment on that parcel or not.

At the end of the protest hearing, the Authority then adopted Resolution 94-8 without change to any of the assessments set forth in Appendix A to the Engineers' Report and "finally approved" the report in paragraph 2 of the resolution. In the next paragraph of the resolution, the Authority approved and adopted "The assessments for Fiscal Year 1994-1995 and method for assessment in the Engineers' Report are hereby approved and *said assessments are hereby levied.*" (Emphasis added.)

By this act of imposing a specific levy against each of the individually identified parcels in Appendix A, the Authority was determining and adjudging the definitive financial obligation imposed on each property. This was *an act of finality* as to what the exact financial burden is with respect to any individual parcel. This was not an act that "prescribes what the law shall be in future cases arising under it." These *are* the "cases" adjudged based on legislative rules adopted in April. They now represent a definitive financial burden on each specific parcel of property just as a court judgment that definitively determines the obligation on property where the court upholds a mechanics lien or a mortgage lien on the underlying property; it is now an act in the past and not one looking to a "future case arising under it".

As stated in *Mullane* at page 314:

> "An elementary and fundamental requirement of due process in *any proceedings which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.)

The levy of the assessments in the present matter were, accordingly, as adjudicative as the acts addressed in *Mullane*. In *Mullane* "there are many" beneficiaries under the 113 trusts involved in that matter. The Appellate Court at page 33 interprets *Mullane* to say that "notice required will vary with the circumstances and conditions" and, accordingly, that mailed notice should "place no onerous burden on the taxing authorities." The burden Mullane addresses, however, is focused on how much effort is imposed on the entity in determining the identity, address and interest of the property owners and not the burden of mailing out the notice. Here there is no issue of identity or addresses as they are readily at hand in the same tax rolls used to make a list of the parcels levied upon. The cost of mailing indicated by one of the parties in an Amicus Brief was forty-four (44) cents per property owner; and this is a recoverable cost as an "incidental expense" in the LLA. The issue here is whether the potential assessees would be willing to pay the small cost of mailing in order to have proper notice of a planned assessment, not the possible inconvenience to the entity.

The Appellate Court is in error when it finds that, to the contrary, the act of imposing the levy is legislative in nature or that mailing is a *Mullane*-excused burden when there are many thousands of affected property owners. Although open space districts are laudable, should the public entities that create and manage them be excepted from constitutional guarantees? If it not permissible to violate fourteenth amendment rights when only a few involved, is it permissible if there are hundreds of thousands? Where do you draw the line on the number? Where do you draw the line on the type of constitutional guarantee to except? What other laudable public entities should be excepted?

BI-METALLIC

In *Bi-Metallic* (cited above) the Colorado Legislature had increased the assessed value of all properties in the city of Denver by 40%. The proceeding in *Bi-Metallic* had reached the same general point as the proceedings in the instant case in April of 1994 when the method for determining the level of assessment for the various classes of property was approved by the Authority in the Engineer's Report. Matters to this point were legislative in character in both *Bi-Metallic* and the present matter.

Moreover, *Bi-Metallic* was dealing with the subject of a tax; here we are dealing with an assessment.

As stated in *Bi-Metallic,* the individuals can only protect their rights in a complex society "by their power, immediate or remote, over those who make the rule." If a public entity such as a state legislature or city council passes legislation that imposes an overly burdensome tax, one's recourse is at the polls at the next election to vote in representatives to repeal it.

But when a legislative representative seeks to impose a lien on private property to secure the cost for a capital improvement paid for by bonds in the hands of third parties, one cannot reverse this at the polls. Once the bonds are issued, changing representatives will not alter the fact of a long-term lien on one's property. Moreover, unlike public bonds secured by the credit of the public entity, the assessment lien is secured directly by the private property of the property owners in the district. The public entity cannot be looked to by the bondholder for recompense on a defaulted bond payment, only the private property which secures the bond is available to make the bondholder whole. Benefit assessments are not for raising money for public purposes but are compensation for one's property being enhanced in value because of a proposed improvement. The difference between a tax and an assessment has further fundamental distinctions: unlike a property tax payment, it is not a deduction for income tax purposes but, instead, represents an increase to the basis or value of the property. Many early cases lumped assessments with taxes as being part of the general power of a public entity to raise funds for the running of governments. The modern view clearly recognizes the significant difference between the two funding mechanisms.

Unlike a general tax, the levy of a benefit assessment is, accordingly, an act by a legislative body with the same quality of finality as that of a court judgment. The avenue of recourse suggested in *Bi-Metallic* is not available in an assessment for an improvement to be paid for by the issuance of long-term bonds, as is the case in the instant matter. It is not simply an onerous tax that can be reversed by election of more desirable representatives.

THE *WISCONSIN ELECTRIC* PER CURIAM

This Court in its 1956 Per Curiam (citation above) found that the act of levying an assessment without mailed notice violated due process. To the extent the legislative or adjudicative classification played any role in this Court's analysis and findings leading to the 1956 per curiam, it appears that it either considered the act to be judicial in character or that it did not make any difference. Notification by mail was required to the property owners whose property was to be subjected to the assessment lien. (*Wisconsin Electric* was not the only assessee. See Appendix J, from Wisconsin Electric's brief to the Wisconsin Supreme Court.)

The one case that speaks directly to the issue of assessment-noticing was a 1960 Minnesota Supreme Court decision dealing with a city's assessment levy noticed by publication where the levy predated the *Wisconsin Electric* Per Curiam but was decided afterward with this Court's 1956 per curiam as its centerpiece:

> "We find no difficulty in accommodating our view to accord with those of the U.S. Supreme Court and the Supreme Court of Wisconsin on this subject. In the interests of good government, those in charge of adopting a special assessment for a local improvement and levying a tax therefor should employ a reliable method of informing interested parties of the fact that their rights are being affected. The taxing authorities should be required to do something more than cause the publication of notice in local newspapers. It was said in the *Walker* case that (352 U.S. 116, 77 S.Ct. 202, 1 L.Ed.2d 182) 'It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property.' And in the *Mullane* case, Mr. Justice Jackson said (339 U.S. 315, 70 S.Ct 658, 94 L.Ed. 874): ' * * * Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper normal circulation the odds that the information will never reach him are large indeed.' "

(*Meadowbrook Manor, Inc. v. City of St. Louis Park,* 258 Minn. 266, 104 N.W.2d 540, 545, 1960.)

The Minnesota Supreme Court touches on the legislative act/judicial act issue at page 544:

> "The decision of the U.S. Supreme Court in the Milwaukee case is per curiam and does not by its language provide reasoning which

> extends the *Mullane* and *Walker* authorities to special assessment proceeding. Nevertheless, the disposition of these cases, which involve a common principle of law, establishes a line of authority which impels us to the conclusion that the doctrine stated in those cases has in fact been extended to the special assessment *field*.
>
> "Moreover, we find nothing in the decisions of the U.S. Supreme Court which would indicate that the adequacy of notice by publication *might turn upon the particular type of proceedings under examination*. On the other hand the U.S. Supreme Court in the Milwaukee case had before it the question of sufficiency of published notice in a special assessment case precisely as we have here. The clear implication of that decision is that the court felt published notice did not satisfy due process. The Supreme Court of Wisconsin, which fully understood the facts and applicable law, accordingly followed the direction of the U.S. Supreme Court and in applying the *Walker* holding to the facts before it held that the *published notice of the assessment proceeding did not satisfy due process*." (Emphasis added.) (Meadowbrook was not the sole assessee as it was assessed $44,400 of a total of $130,600. See Appendix K, page 17 in Meadowbrook's brief to the Minnesota Supreme Court.)

It is quite clear that what was important was not the label placed on an act of the city council, but the effect that act has: of imposing an assessment levy and direct liens on private property. As discussed above, such a lien is not a public debt and a bondholder cannot look to the public entity for payment as it is not a debt of the public entity. The fundamental difference between a tax, which can be imposed on property owners without notice of any kind, and a benefit assessment lien is that the latter imposes a direct lien on private property and it is not an obligation of the public entity. The levy of an assessment is, therefore, an act by the public entity that has a direct impact on private property interests. The type of interest that raises an issue of due process.

In the late 1800's and early part of this century a significant number of cases considered the levy of an assessment to be a legislative act of the public entity allowing notice by publication. These cases were mentioned by the Minnesota Supreme Court in *Meadowbrook* at pages 541-542:

> "It is unnecessary to cite the numerous authorities which have held that the notice required in an assessment proceedings is not the same kind of notice required in a suit of law and that constructive notice by newspaper publication of assessment proceedings complies with due process requirements. This is particularly true as applied to notices published pursuant to procedures established by statute . . . (Citing these earlier authorities.)
>
> "The taxpayer contends that since *Wisconsin Elec. Power Co. v. City of Milwuakee*, 352 U.S. 948, 958, 77 S.Ct. 324, 351, 1 L.Ed.2d 241, 317, *the foregoing authorities are no longer controlling* as to the particular facts in this case." (Emphasis added.)

The Minnesota Supreme Court agreed with this contention in light of this Court's 1956 per curiam.

Respondent on page 20 of its brief to the California Appellate Court in June 1996 cited four cases from that same era as authority that benefit assessments are quasi-legislative in nature. After analyzing this Court's Wisconsin Electric per curiam, Respondent concludes on page 22 of its brief:

> "All of this is hardly persuasive that the U.S. Supreme Court has changed the rules, established in a long line of cases, cited above, that published notice in assessment cases is sufficient. . . . One cannot, of course, be certain of what the U.S. Supreme Court had in mind in making its remand order in the Wisconsin case in 1957."

These numerous early cases are considered "no longer controlling" by the Minnesota Supreme Court in light of this Court's per curiam. These and the cases cited by the Respondent Authority from the same era were at a time prior to the advent to radio and television as well as the numerous publications that by the 1950's were vying for one's attention. At the time of these cases the local newspaper was the only medium available and was well read. The chances of a notice affecting one's property was relatively good; moreover, the reliability of the mail service was not as high as it was by the 1950's. As noted by the property owner, Meadowbrook Manor, in discussing the adequacy of published notice in its Petitioner's Brief to the Minnesota Supreme Court at page 30 (see Appendix L):

> "In the circumstances of today, when news is transmitted by newspapers, news magazines, radio and television, is this adequate notice, 'reasonably calculated' to inform? Perhaps such

> published notice was adequate in the 19th century, when the only new source was the local newspaper, but it is not adequate today."

Meadowbrook, in its brief, observes that the *Mullane* and *Wisconsin Electric* decisions are expressions by the U.S. Supreme Court that recognize this change in the way we communicate and that mailed notice is what is properly required in this day for proper notice of benefit assessment levies on private property.

The *Meadowbrook* case continues to be the one case that is most extensively analyzes this Court's *Wisconsin Electric* per curiam. As noted in *Meadowbrook* (page 544) the Wisconsin legislature amended its laws after the per curiam to require mailed notice in benefit assessments. Meadowbrook in its Petitioner's Brief to the Minnesota Supreme Court at page 13-14 (see Appendix M) discusses the contemporary developments in the three years since the *Milwaukee Electric* per curiam:

> "The Milwaukee case has aroused considerable comment within the Municipal Law Section of the American Bar Association. Inside the back cover of this brief will be found photostatic reproductions of (a) pages 85-86 of that section's annual Committee Reports Supplement dated October, 1957, and (b) pages 95-96 of the same section's Committee Reports Supplement dated November, 1958. The program of the Municipal Law Section at the 1959 annual meeting of the ABA included a panel discussion of the Milwaukee case."

As stated in the October 1957 Report (see Appendix N):

> "In the opinion of the committee on Special Assessments and Taxing Districts one case decided in the past year is of far-reaching importance. The Supreme Court in Wisconsin Electric Power Company v. City of Milwaukee, 352 U.S. 948 stated:
>
> 'Appeal from the Supreme Court of Wisconsin.
>
> 'Facts and opinion, 272 Wis. 575, 76 N.W. 2d 341.
>
> 'Dec. 17, 1956. PER CURIAM. In this case probable jurisdiction is noted. The Judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County for consideration in the light of *Walker v. City of Hutchinson*, 77 S.Ct. 200.'
>
> *"This opinion, superficially, does not seem very important. Its history and the citation of authority therein substantially alters this picture."* (Emphasis added.)

On page 86 the Committee Report continues:

"The ramifications of the Milwaukee case are far-reaching." (Emphasis added.)

The ABA Municipal Law Committee recognized that the Milwaukee case (i.e., *Wisconsin Electric* case) had worked a fundamental change in how notice must be given when a levy for a benefit assessment is made against private property. It opines that statutes in many states may produce levies of questionable validity and that statutory amendment will be needed in many instances.

In the Committee Report a year later (see Appendix O) at page 95 observes that a number of states have statutes that "merely provide for published notice" and that there has not yet been an opportunity for the state legislature to amend such acts. At the top of the second column the report states:

> "Concern has been expressed because of the type of statement which appears in McQuillin, Municipal Corporations, 3rd Ed., Sec.38.98:
>
> > 'Although a contrary rule appears to obtain in some jurisdictions, according to the weight of authority a statute or charter provision authorizing special assessments, which fails to provide for notice to property owners and an opportunity to be heard at some stage of the proceedings is unconstitutional, as depriving persons of their property without 'due process of law'
> >
> > 'Numerous cases are cited in that text in support of the statement, and those and other cases and texts contain similar statements'."

At the end of page 95 the committee report states:

> "At least a majority of the committee believe that a political subdivision can meet the 'due process' test by mailing notice properly addressed to the last known owner at his last known address as shown by the city or county records, without the necessity of proving the receipt of mailed notice or showing actual notice, as under normal circumstances mailed notice is reasonably calculated to inform parties of proceedings which may directly and adversely affect their (i.e. property owners') legally protected interests. *Walker v. City of Hutchinson,* 77 S.Ct. 200 at 202."

The report then observed that even though a relatively small number of legislatures met early in the calendar year 1958 some states had already commenced amendments to the state assessment laws to call for mailed notice or better.

The picture that unfolds is that the Municipal Law section of the ABA represented a broad cross-section of municipal lawyers throughout the United States and that the *Wisconsin Electric* per curiam was taken very seriously even before the Meadowbrook case was decided. The upshot was that many states' codes were amended to require at least mailed notice for an assessment levy.

In fact this is the requirement in California for benefit assessments. Calif Gov 54954.6 (c) specifically requires mailed notice for assessment levies. It is part 4 that permits open space districts to be exempt from the constitutional provisions for due process.

Although no cases have been found that are as directly on point as the Meadowbrook case, there are a number of cases that touch on the point of the requirement of due process notice of affected property owners when the public entity acts to impose a levy on their property. One of them addresses the subject of legislative acts in the proceedings leading up to the levy of a benefit assessment. In *Blankenburg v. City of Northfield,* 462 N.W.2d 417, 419 (1990) the court states:

> "We take this opportunity to reiterate that due process does not attach at the feasibility hearing because *it is a legislative function."* (Emphasis added.)

The court in the same paragraph (page 46) continues:

> "*Due process does attach, however, at the assessment hearing* because the assessment becomes a lien on the affected property. (Cites the Meadowbrook case.)" (Emphasis added.)

In another case (cited in the July 1996 Amicus Brief at page 13 by the counties in support of the Authority) the Supreme Court of Arkansas held that due process notice was not required in that its " . . . decision is limited to the sufficiency of the notice *in establishing the district.*" (*Cypress Creek Farms v. L'Anguille Improvement District*, 626 S.W.2d 357, 359 (1982). (Emphasis added.)

Justice Smith in a concurring opinion on page 359 adds:

> "I do not think that with respect to the mere formation of the district there is any due process requirement. . . .
>
> There is no threat to the appellant's land *until* the benefits, if any, have been assessed and taxes have been *levied*. At that time the appellant may have a *ground for complaint under the due process clause. . . .* " (Emphasis added.)

These two cases say the same thing. A number of acts by a public entity leading up to the levy, such as the decision to make the improvement or the formation of the assessment district, do not require due process notice as they are legislative in character. However it is a different matter when the public entity acts to impose the lien of an assessment against private property. The act of burdening private property with an assessment lien, as clearly implied in the *Northfield* case, is *not a legislative act*, as "due process does attach".

We believe it is clear that on the issue of due process notice in the last half of this century the focus has indeed shifted from the legislative vs. judicial dichotomy to an analysis of the underlying property interest. Since the *Mullane* and *Wisconsin Electric* cases in the 1950's the focus has indeed been on the underlying interest. As the Minnesota Supreme Court observed in 1960, a number of earlier cases considered the legislative/judicial analysis to be determinative. The Minnesota court instead focuses on the underlying property interest that is affected by the imposition of a benefit assessment lien:

> " . . . due process requires that the property owner is entitled to a reasonable notice and hearing before his property is subjected to the lien of a special assessment for a local improvement." (page 543.)

◆

CONCLUSION

It has been over 40 years since this Court addressed the issue of the need for due process notice in benefit assessment levies against private properties. It has been observed that a rule of law begins to undergo serious buffeting after a generation or two. In the thirty plus intervening years nearly all of the members of the Municipal Law Section of the ABA have no doubt retired and a new generation of municipal and legislative counsel has no recall of the "far-reaching" *Wisconsin Electric* case. Hence, a special exception for Open Space Districts should have, but did not, set off any alarms when Government Code Section 54954.5(c) was modified in 1993.

It is clear that the generation that thought the Per Curiam of 1956 was of "far reaching effect" is no longer a part of our collective legal-community memory. It is interesting to note the several comments made by opposing counsel:

As observed in the July 1996 Amicus Brief on behalf of the counties:

> "Given the lack of jurisprudence on this issue in the past 40 years, it is simply not reasonable to conclude that the Supreme Court's remand of *Wisconsin Electric* created a constitutional bar to notice by publication." (page 13 of counties' amicus brief); and

The Respondent similarly expressed that the *Wisconsin Electric* case was an anomaly and should be relegated to the backwaters of our precedent-oriented legal system:

> "It is simply not reasonable to conclude, as the Minnesota court apparently did, that the U.S. Supreme Court intended to overrule a distinguished line of cases going back over 75 years, by a six-line remand order to the Wisconsin court." (page 23 of Respondent's brief to the California Court of Appeals, Sixth District on June 11, 1996.)

In view of the increased attention given by America's municipal governments to the use of assessment districts to provide a fresh revenue stream for local governments, it is submitted that this Court should dust off *Wisconsin Electric* and again put it on the entry-way credenza for all to admire once again.

It would seem that a Per Curiam along the lines of this Court's 1956 *Wisconsin Electric* per curiam would be in order; and it would be especially helpful if this Court would note that the analysis of the state supreme court in *Meadowbrook* accurately reflects the intent of this Court. Also helpful would be to add that the act involved in the levy is judicial and not legislative in nature (or that it doesn't matter.) This would be most beneficial in reducing countless hours of unnecessary billable time on a matter that should no longer be an issue in this county in this data-base age. Stealth is certainly appropriate for our country's air defense system. It is not appropriate for our country's local governments in search of fresh revenue streams.

Respectfully submitted,

JOHN H. FINDLEY
Counsel of Record
ZUMBRUN & FINDLEY
2150 River Plaza Drive
Suite 255
Sacramento, CA 95833
(916) 641-0015

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ROBERT F. COLEMAN, et al., Plaintiffs and Appellants, v. THE SANTA CLARA COUNTY OPEN SPACE AUTHORITY, et al., Defendants and Respondents. _______________________/	H014730 (Santa Clara County Super.Ct.No. CV743113) (Filed Oct. 20, 1997)

Plaintiffs and appellants Robert F. Coleman and the Santa Clara County Taxpayers' Association (SCCTA) appeal from the order granting summary judgment in favor of the Santa Clara County Open Space Authority (the Authority or OSA). Appellants challenged the legality of the formation of the Open Space Authority Assessment District, and the assessment levied by OSA. We take up appellants' 10 assignments of error in our discussion. For the reasons stated below we affirm.

STATEMENT OF FACTS

The assessment district was formed to finance acquisitions for open space preservation and the annual maintenance thereof under the Landscaping and Lighting Act of 1972 (the 1972 Act or LLA). (Sts. and Hy. Code, §§ 22500, et seq.) The Authority's jurisdiction consists of three-fourths of all the land in Santa Clara County, not including the Midpeninsula Regional Open Space District. OSA's jurisdiction includes the cities of Santa Clara, San Jose, Milpitas, Campbell, Morgan Hill, and the unincorporated areas of the county. The assessment district selected was smaller, and excludes parcels east of the westernmost ridge line of the Diablo Range and the city of Gilroy.

The basic assessment at issue here is $12 per year per homeowner, and commercial parcels may be assessed up to $300 on a type of point benefit system. Undeveloped parcels pay a lower assessment than developed parcels.

The assessment district was established by OSA after an exhaustive series of public hearings and workshops that took place over several years. Recognizing that the quality of life in the county depends on the overall quality of the environment, the Board of Supervisors in 1985 established a task force to find ways to protect the environment in light of continuing growth pressures and to recommend long-term strategies for the preservation and protection of open space, hillside areas and park lands in Santa Clara County. The task force solicited input from agri-business, real estate interests and planners, and it held public hearings and finally produced the 2020 Task Force Report. The 2020 Task Force Report served to guide activities for the creation of the Authority and for the implementation of its financing through the formation of a special benefit assessment district.

A. Creation of the Open Space Authority

The Open Space Authority was created in recognition of the fact that the next greatest pressures for urban development would occur in the eastern and southern portions of the county. Senator Henry Mello introduced legislation to create the vehicle by which the salutary purposes of an open space district could be achieved. The Legislature passed the Santa Clara County Open Space Authority Act of 1992 (Mello Bill). (Pub. Resources Code, § 35100 et seq., added by stats. 1992, ch. 822 § 1.) The Legislature did not provide a particular funding mechanism, allowing the local agency to select its own.

Representatives from the city councils of San Jose, Milpitas, Santa Clara, Campbell and representatives of the County of Santa Clara met in February 1993, to form the interim board of the Open Space Authority, a special district independent of any other city, county, or local entity. (Pub. Resources Code, § 35123.) The Authority's purposes are to preserve open space, to create a greenbelt, to counter the continuing conversion of land to urban uses, to preserve the quality of life in the county, and to encourage agricultural activities. (Pub. Resources Code, § 35101.) The Authority's jurisdiction includes all areas within the county except those within the boundaries of the Midpeninsula Regional Open-Space District. (Pub. Resources Code, § 35120.) The interim board considered such matters as finance options, securing loans from representative cities for its operations, and identification of desired projects and acquisitions from the representative cities.

The interim board also established a 25-member Citizens Advisory Committee (hereafter CAC) comprised of representatives from business, labor, agriculture, environmental and other communities. The CAC was divided into three subcommittees: (1) districting; (2) acquisitions; and (3) finance. The interim board and the CAC conducted over 40 public meetings in order to achieve the widest possible public input.

B. Creation of the Assessment District

In November 1993, the interim board conducted a survey to find out whether Santa Clara County voters thought that preservation of open space was an important issue, and to find out how much they would be willing to spend on it. The survey results showed that voter support for open space had decreased over the previous 4 years, and that only a bare majority would be willing to spend $10 to $15 per year for this purpose.

The interim board engaged the services of Dennis Klingelhofer, an assessment engineer, to prepare a preliminary feasibility study on funding the special assessment district under the LLA. Following receipt of the Preliminary Feasibility Report, the interim board approved Resolution 94-5 on March 3, 1994, ordering the engineer to prepare an Engineer's Report as required by the 1972 Act. (Sts. & Hy. Code, §§ 22565-22574.)

In April of 1994, the engineer presented his report. He recommended that the assessment district include all the land within the Authority's jurisdiction except that east of the westernmost ridge line of the Diablo Range. The boundaries of the assessment district included about one-half the area of the Authority's jurisdiction and included 294,859 parcels of land. A list of the affected parcels, identified by assessor parcel numbers, is contained in the administrative record. OSA determined that the cost to notify each of the parcel owners individually was prohibitively expensive, hence, it opted to provide published notice as permitted under Government Code section 54954.6.

The Engineer's Report proposed the aforementioned boundaries for the open space benefit assessment district. It noted that the district's purpose was to provide funding for open space by greenbelt acquisition and maintenance throughout the boundaries of the Open Space Authority. The Engineer's Report does not specifically identify what property the Open Space Authority wishes to buy; it merely names, by district, some areas referred to in the 2020 Task Force Report as places which the district might acquire and preserve as open space land. In spite of the fact that the exact lands to be acquired are never identified, the report basically concludes that every owner of a single-family home will be equally benefited by the acquisition of open space, and that a fair assessment for a single-family home is $12 per year, to remain at $12 per year for at least 5 years. The Engineer's Report develops a complicated benefit point system for assessing parcels other than single-family homes. For instance, because ranches and land devoted to agricultural use are already very similar to open space, the owners of those properties would not have to pay any assessment. The owner of a business would pay 80 percent of what a homeowner pays. On April 14, 1994, the interim board adopted Resolution 94-6 finding the proposed assessment to be in proportion to the estimated benefit to the parcels.

On April 26, 1994, the interim board adopted Resolution 94-7 to order formation of the assessment district and to levy and collect the assessment. The interim board set the dates and places for a public meeting and public hearing for June 27, 1994, and July 6, 1994, respectively. The resolution also ordered that published notice be given according to law pursuant to Government Code section 54954.6. Notice was published in the San Jose Mercury News on May 16, 23, and 30, 1994.

On June 7, 1994, the voters within Santa Clara County received a sample ballot requesting their approval of Measure A, an advisory measure proposing that an assessment of $12 be levied by the Authority on each single family residence. The plaintiffs were involved early in the process as they submitted opposition to the measure which was printed in the sample ballot. The measure was approved by 57.4 percent of the voters. At the same election members of the permanent Open Space Authority board were elected.

The elected board was sworn in at the June 27, 1994, noticed public meeting, and it received the Engineer's Report and opinion. It was disclosed that some of the parcels on the roll had been misclassified relative to the ridge line and that a new roll, supplemented by about 10,000 parcels would be delivered to the clerk's office for public view. The board then conducted a public meeting at which 20 citizens, supporters and opponents alike, commented on the Engineer's Report. Out of concern and interest for giving more time to hear from the public, the board kept the July 6 hearing date to receive more input, and continued the final hearing date (the protest hearing) to July 20, 1994. Notice of the protest hearing was published three more times in the San Jose Mercury News on July 4, 11, and 18, 1994. At the public meeting on July 6, 1994, the board heard more testimony from 25 speakers both in favor of and in opposition to the assessment. Appellants' representative objected to the board's adding 10,000 parcels, stating there were compliance problems under the 1972 Act. The board set a special business meeting for July 13, 1994, to receive information from staff and counsel concerning matters raised by members of the public at the meeting.

At the business meeting on July 13, 1994, counsel reported that the interim board had made a policy decision to permit any property owners exempt from the assessment to file protests, and to have their protests count toward the majority. Counsel also clarified that properties not in the district, that is east of the ridge line, would not be counted. The Authority also considered the issue of whether to include in the assessment district the 10,000 parcels which were not listed on the assessment roll at the time notice was first published May 16, 1994. Because the board could not meet the statutory notice requirements as to those parcels, it decided not to include them but to annex them later.

At the July 20, 1994, protest hearing 77 people testified, some favoring formation and others opposing it, and some offering general comment. No one commented on the Authority's decision to count protests from exempt property owners, and only two people (including plaintiff) commented on the decision to exclude for the present the 10,000 parcels and to annex them later. The Authority accepted written protests until the close of the hearing, and the engineer calculated that the valid protests filed did not amount to a majority. A written protest summary indicates that the protests constituted 21.53 percent of the total acreage. The summary also referred to 471 protests from parcels located outside the district, including the 10,000 parcel area. After determining that a majority protest within the meaning of the act did not exist, the elected board adopted Resolution 94-8 by a vote of six to one, finding it had received and considered oral and documentary evidence concerning the formation of the district, the levy of the assessment, and the benefits to be derived. The Engineer's Report, which set forth the estimated benefits to be received by each parcel, was adopted and formation of the district was ordered.

PROCEDURAL BACKGROUND

In the first amended complaint plaintiffs complain in the first cause of action that there was a denial of due process in the manner of noticing the protest hearing. Plaintiffs assert that the publication of the notice three times in the San Jose Mercury News was not made in a manner calculated to put the plaintiff property owners on actual notice that an assessment was proposed and that they had a right to protest the formation of the assessment district. In the second cause of action plaintiffs complain that there was a denial of due process because plaintiffs and others who owned parcels subject to eminent domain were arbitrarily removed from the proposed district at a special meeting of the board. This last minute removal of the 10,000 parcels, they assert, deprived them of their right to protest. In the third cause of action plaintiffs seek a declaration that the Mello Bill denies viewshed property owners equal protection under federal law. Plaintiffs claim that owners of land designated as "viewshed" may have their property taken. Whether one should define the hills as looking down on the valley so that the valley must be "viewshed," or whether one defines the viewshed as the hills up to which the valley dwellers look, is arbitrary, claim plaintiffs. In the fourth cause of action plaintiffs seek a declaration that the combined effect of an inadequate method of notice and the arbitrary acts of the Authority substantially affected plaintiffs' due process right to mount an effective protest. In the fifth cause of action plaintiffs claim that the 1972 Act by definition only covers funding of definitive capital improvements which are capable of having a definitive cost estimate. In the sixth cause of action plaintiffs seek a declaration that acquisition and maintenance of land under the Mello Bill is not within the scope of the LLA. In the seventh cause of action plaintiffs seek a declaration that the proposed assessment district is a project within the meaning of the California Environmental Quality Act (CEQA), necessitating an environmental impact report. In the eighth cause of action plaintiffs seek a declaration that a resolution made by the board is invalid because of the misconduct of a board member. In the ninth cause of action plaintiffs claim that the assessment is really a special tax which requires a two-thirds vote of the people. In the tenth cause of action plaintiffs claim the attempted formation of the district is .void because of failure to comply with the LLA. In the eleventh cause of action plaintiffs claim the interim and elected boards of the

Authority violated the express provisions of the enabling legislation, because the interim board made funding and other decisions that should have been made, by statutory definition, by the elected board.

In defendant's summary judgment motion, defendant generally refuted the contentions made in the complaint. Defendant asserts there is a highly deferential standard of review involved when a court reviews an assessment created by a legislative process. (*Knox v. City of Orland* (1992) 4 Cal.4th 132, 146 [hereafter simply *Knox*], citing *Dawson v. Town of Los Altos Hills* (1976) 16 Cal.3d 676, 684-685 [hereafter simply *Dawson*].)

Defendant argued the assessment was definitely an assessment and not a special tax that would require a two-thirds vote under article XIIIA of the California Constitution. The difference between an assessment and a tax is explained in the *Knox* case. An assessment is levied against particular real property that benefits from the improvement, and a tax can be levied without reference to the benefit a particular taxpayer does or does not enjoy. Defendant argued the record showed that the benefit was proportional to the assessment levied. Defendant argued its notice was given in compliance with the statute, and that removal of the 10,000 parcels from the assessment district denied no due process rights. Defendant argued that making acquisition of viewshed property a top priority is a rational legislative act which does not violate any equal protection or due process rights. In addition, defendant argued the combined effect of published notice and exclusion of certain properties violates no rights. The LLA, argued defendant, does not require specific open space acquisitions to be identified prior to the imposition of the benefit assessment. (See Sts. & Hy. Code, §§ 22565-22569.) Further defendant argued that under the LLA acquisition is not required to be incidental to existing park improvements. Defendant contended that the assessment district is not a project within the meaning of CEQA. Conduct of one board member does not invalidate the assessment district, stated defendant. According to defendant, the legislative acts which created the assessment are presumed valid in the discretion of the Open Space Authority and actions of the board are presumed to be proper. The trial court granted defendant's summary judgment motion.

DISCUSSION

I. Notice

A. Statutory Requisites

Clearly there are two sides to the notice coin – one is whether the notice was sufficient under the statute and the other is whether the notice given passes constitutional muster. We discuss statutory sufficiency first, and begin by setting out the statutory scheme.

Notice of the formation of OSA and the levy of the assessment was given pursuant to Government Code section 54954.6, subdivision (c)(4). (References in this part of the opinion are to subdivisions of that statute.) The subject of the statute is notice of public meetings and public hearings for new or increased taxes or assessments. Subdivision (a)(1) provides in pertinent part: "Before adopting any new or increased general tax or any new or increased assessment, the legislative body of a local agency shall conduct at least one public meeting at which local officials must allow public testimony regarding the proposed new or increased general tax or new or increased assessment in addition to the noticed public hearing at which the legislative body proposes to enact or increase the general tax or assessment."

Subdivision (b)(1) provides that notice of public meeting and public hearing for a new or increased tax "shall" be by publication in a local newspaper for three weeks. Subdivision (b)(2) enumerates what must be included in the notice.

Subdivision (c)(1) provides: "The joint notice of both the public meeting and the public hearing required by subdivision (a) with respect to a proposal for a new or increased assessment on real property shall be accomplished through a mailing, postage prepaid, in the United States mail and shall be deemed given when so deposited. The public meeting pursuant to subdivision (a) shall take place no earlier than 10 days after the joint mailing pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision. The envelope or the cover of the mailing shall include the name of the local agency and the return address of the sender. This mailed notice shall be in at least 10-point type and shall be given to all property owners proposed to be subject to the new or increased assessment by a mailing by name to those persons whose names and addresses appear on the last equalized county assessment roll or the State Board of Equalization assessment roll, as the case may be." Subdivision (c)(2) enumerates what must be included in the mailed notice.

Subdivision (c) (4), added in 1993, provides that OSA and other open space and park districts may give notice by publication (according to (b)(1)) instead of by mail ((c)(1)).[1]

---

[1] The actual notice published in the San Jose Mercury News read as follows:

NOTICE OF PUBLIC HEARING
Before the
Santa Clara County Open Space Authority

NOTICE IS HEREBY GIVEN that on Wednesday, July 20, 1994 at 7:00 p.m. or as soon thereafter as the matter can be heard, in the Isaac Newton Senter Auditorium, County Government Center, 70 West Hedding Street, San Jose, California, the Santa Clara County Open Space Authority will hold a public hearing to consider the adoption of the formation of an open space assessment district and levy of assessment in a portion of Santa Clara County in accordance with Resolution No. 94-7.

District funds may be used for the acquisition and/or preservation of open space lands which are of regional significance and are within the District's boundaries. Parcels of land which may be acquired or preserved as open space or greenbelt lands may include, but are not limited to, all available land and water areas that can serve as open space in Santa Clara County which are within the boundaries of the Authority and to the west of the first ridgeline of the Diablo Range. Specific potential acquisition and improvement areas are listed within the Preliminary Engineer's Report*. Potential acquisition and improvement areas also include, but are not limited to, lands in the cities of Campbell, Milpitas, Morgan Hill, San Jose, Santa Clara, and in the unincorporated areas within the district.

Funds may also be used for the development, improvement or operation of open space and greenbelt lands acquired or controlled by the District.

The amount of the assessment per parcel is calculated based upon a formula which is summarized below and which is set out more particularly in a document entitled "Preliminary

Before turning to the statutory sufficiency of the notice, briefly we note the difference between a special

---

Engineer's Report - Section V, Method of Apportionment of Assessment" on file and available in the Office of the Clerk of the Board of Supervisors, Tenth Floor, East Wing, County Government Center, 70 West Hedding Street, San Jose, California, 95110.

The assessment is based upon a formula which takes into account benefit factors and the existing uses of parcels to be assessed. Each parcel will be assessed an attributable "benefit point" or "benefit points" according to the formula. Each benefit point will not exceed twelve dollars ($12.00) per year. The value attributed to the benefit point will remain constant for at least a five year period.

By example, a single family residential parcel will be assessed one (1) benefit point. The annual assessment will not exceed twelve dollars ($12.00) per year and will not be increased for a five year period.

By example, commercial and industrial properties will be assessed from one to not more than twenty-five (25) benefit points. Undeveloped and vacant properties, under the formula, will be assessed a smaller fraction of the assessment assigned to developed properties with similar uses. The maximum annual assessment will not exceed three hundred dollars ($300.00) per year over a five year period. 64 [sic] Agriculture land will not be assessed.

Based upon the testimony heard and written communication considered, the Authority may make changes in the assessment methodology or the amount of the assessment prior to levying the assessment as long as the amount of the assessment is not increased.

A majority protest will cause the assessment to be abandoned. A protest majority exists if, upon conclusion of the hearing, written protests filed and not withdrawn represent property owners owning more than 50% of the area of assessable lands within the proposed district. Any property owner(s) who wishes to mail a written protest should send assessment and a tax. "A special assessment is a compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . [A] special assessment is levied against real property particularly and directly benefited by a local improvement in order to pay the cost of that improvement. The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits

---

written communication to Office of the Clerk of the Board of Supervisors, Santa Clara County Open Space Authority, Tenth Floor, East Wing, County Government Center, 70 West Hedding Street, San Jose, California 95110.

ALL INTERESTED PERSONS may appear and be heard [at] said time(s) and place(s). Written communications should be filed with the Office of the Clerk of the Board of Supervisors, Tenth Floor, East Wing, County Government Center, 70 West Hedding Street, San Jose, California 95110, prior to the conclusion of the hearing. Questions concerning the aforementioned meeting and hearing should be directed to Greg Sellers, Acting Staff Analyst, Santa Clara County Open Space Authority at (408) 252-8912.

SANTA CLARA COUNTY OPEN SPACE AUTHORITY
/s/ Greg Sellers
Acting Staff Analyst
Santa Clara County Open Space Authority

*Portions of the information contained within this public notice have been excerpted from the "Preliminary Engineer's Report". Full text of which is available to the public at the Office of the Clerk of the Board, Tenth Floor, County Government Center, 70 West Hedding Street, San Jose, California.
July 4, 11, 18, 1994

for the few, and the few specially benefited should not be subsidized by the general public." (*Knox, supra,* 4 Cal.4th at pp. 141-142, citations and internal quotation marks omitted.) In reality a special assessment is a compulsory charge to recoup the cost of a public improvement made for the special benefit of particular property. (*Id.* at p. 142.) A tax is very different in that it can be levied without reference to peculiar benefits to particular individuals or property. Indeed nothing is more familiar in taxation than imposition of a tax upon a class of persons who enjoy no direct benefit from it. Even a special tax levied to fund a specific governmental project need not specifically benefit the taxed property, unlike a special assessment. (*Ibid.*)

The 1972 act itself specifies a limited standard of review on appeal. Section 22509 of the Streets and Highways Code provides: "This part shall be liberally construed to effectuate its purpose. Any proceedings taken under this part and any assessment levied pursuant thereto shall not be invalidated for failure to comply with the provisions of this part if such failure does not substantially and adversely affect the rights of any person. All determinations made by the legislative body pursuant to this part shall be final and conclusive in the absence of fraud or prejudicial abuse of discretion."

In *Knox,* the California Supreme Court reaffirmed the standard for judicial review of a special assessment which it had announced in *Dawson, supra,* 16 Cal.3d 676. The court there stated: "A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed on the properties to be assessed or that no benefits will accrue to such properties." (*Dawson, supra,* 16 Cal.3d at p. 685; *Knox, supra,* 4 Cal.4th at p. 146.)

With this deferential standard of review in mind, we turn to the question of whether OSA's notice met statutory requirements. When a statute requires an agency to give notice of a public hearing, the agency satisfies its statutory obligations if the notice is in substantial compliance with the requirements of the statute. (*Downtown Palo Alto Com. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 398-399, hereafter simply *Downtown Palo Alto.*) " 'Substantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute.' [Citation.]" (*National Parks & Conservation Assn. v. County of Riverside* (1996) 42 Cal.App.4th 1505, 1522.)

The pertinent statutory scheme is based on the Santa Clara County Open-Space Authority Act of 1992, Public Resources Code section 35100 et seq., which the Legislature enacted to create the Santa Clara Open Space Authority. Part of that act, Public Resources Code section 35134, provides that all meetings must be conducted pursuant to the provisions of sections 54950, et seq. of the Government Code. Section 54954.6 of the Government Code, quoted extensively *supra* at pages 12-14, sets out the method for giving notice by publication of a public hearing concerning a proposed new assessment. The objective of the statutory notice requirement is to inform the public that a meeting will be held to consider the adoption of a new assessment. (See Gov. Code, § 54954.6, subd. (a)(1).)

Consistent with the requirements of Government Code section 54954.6, OSA published a notice in the San Jose Mercury News of a meeting at which objections could be made to the proposed assessment. As required by subdivisions (b) (1) and (b) (2) of section 54954.6, the published notice included the amount of the tax or assessment ($12.00 per year per residential parcel, with commercial parcels not to exceed $300 per year); the activity to be taxed (owning parcels of land); the method and frequency of the tax (to be assessed annually at a constant rate for five years); the date and time of the hearing; and a contact at OSA (the telephone number of the staff analyst). (See Gov. Code, § 54954.6, subd. (b)(2)(A-F).) (Although subd. (b) applies to taxes, appellants argue that since subd. (c)(4) allows published notice according to subd. (b)(1), that the requirements of subd. (b)(2) are implied. We think, on the contrary, that the notices required with respect to a new or increased assessment are those enumerated in subd. (c)(2)(A-G). A primary difference would be that the amount of revenue to be raised by the tax must be included, but this is not a necessary item in an assessment notice.)

Appellants argued two defects in the notice: (1) that it did not contain the estimated amount of revenue to be raised, and (2) that the reader cannot tell by the study of the notice whether or not he is affected by the assessment.

We do not agree that the notice is completely deficient in informing the reader whether he will be subject to the assessment. The notice says the assessment will be levied on a portion of Santa Clara County in accordance with Resolution 94-7. It mentions that: "Parcels of land which may be acquired or preserved as open space or greenbelt lands may include, but are not limited to, all available land and water areas that can serve as open space in Santa Clara County which are within the boundaries of the Authority and to the west of the first ridgeline of the Diablo Range." The notice says that specific acquisitions are listed in the Engineer's Report, and also states that potential acquisition and improvement areas include the cities of Campbell, Milpitas, Morgan Hill, San Jose and Santa Clara and unincorporated areas. Since the name and telephone number of the staff analyst are given in the notice, and there is reference to a particular resolution, and because it says that land east of the ridgeline of the Diablo Range will be excluded, the reader has some idea about whether his land is included. (*Morgan v. Community Redevelopment Agency* (1991) 231 Cal.App.3d 243, 253-254.)

Turning to plaintiffs' complaint that the notice did not state the estimate of the total amount to be collected, we find that if required, there was no prejudice from this omission. In the first place, the amount of revenue to be raised was discussed at the hearings at which plaintiffs were present. In the second place, appellants cannot complain successfully about a claimed defect unless they prove that they were prejudiced. (*Downtown Palo Alto, supra,* 180 Cal.App.3d at p. 398.)

In *Downtown Palo Alto,* business owners challenged the establishment of the downtown improvement district. Roughly one-quarter of the businesses located downtown did not receive the required mailed notice regarding the proposed improvement district. The appellate court held that the parties who did receive notice and who appeared at a hearing to contest the proposal had standing to object to the failure to provide complete notice only if they could show demonstrable prejudice. (180 Cal.App.3d at p. 398.) The court stated that prejudice might be shown in two ways: "First, proof that but for lack of compliance with the notice requirements a majority protest could have been assembled so as to terminate the proceedings . . . would certainly suffice. In the absence of proof of a majority protest, the party challenging the notice procedure can still gain standing by proof of a reasonable probability that lack of compliance with notice requirements severely compromised efforts to gather and present sufficient opposition to the intended improvement area to convince the city council to defeat the proposal." (*Ibid.*) Appellants in *Downtown Palo Alto* failed to make such a showing. Only three of those who received notice opposed formation of the improvement district at the hearing. Even if every one of the persons not notified had opposed the project, still a majority could not have been assembled. Under the circumstances there was not a sufficient showing of prejudice to permit appellants' challenge to the notice procedure. (*Ibid.*)

The court in *Morgan v. Community Redevelopment Agency, supra,* 231 Cal.App.3d at pages 252-254, applied the *Downtown Palo Alto* standard, and held that notice of a public hearing on the formation of a redevelopment project substantially complied with statutory requirements. The redevelopment agency sent notice by certified mail to the owners of property within the proposed project area as established by County of Los Angeles lists. The agency sent notice to all persons requesting same whether or not those were property owners. The agency distributed notices to residences and businesses throughout the project area, and published notice in two newspapers of general circulation, not one as required by the governing statute. Appellants urged that the agency was required to send notices to each assessee on the county tax assessment roll including spouses and children of joint owners, and further, if a person owned more than one parcel, the agency would be required to send him a notice for each parcel within the project area. Under the circumstances the court held that the agency made reasonable efforts to notify the public, that appellants received actual notice of the hearing, and that appellants did not demonstrate that a substantial number of persons failed to receive notice. (*Ibid.*)

Firestone Tire & Rubber Co. v. Board of Supervisors (1958) 166 Cal.App.2d 519, relied upon by appellants, is distinguishable. In that case the county sought to annex property owned by Firestone to a fire protection district. Notice was published in a newspaper that had no subscribers and was delivered free to homes and businesses outside the territory sought to be annexed. In addition, even if one had seen the notice, it was not possible to ascertain whether one's property was affected. (*Id.* at p. 525.) *Firestone* merely stands for the proposition that no compliance with statutory notice requirements is not substantial compliance. (*Id.* at p. 526.)

In this case the record fails to show that appellants showed the sufficient amount of prejudice to give them standing to complain about statutory defects in the notice. They did not demonstrate a reasonable probability that their efforts to mount a protest to the proposed assessment were severely compromised, since appellants attended the public hearings and did protest the formation of the assessment. Appellants took out advertisements in the San Jose Mercury News urging the public to oppose the assessment, and they also attempted to organize a protest group. They wrote formal opposition to the ballot measure about the proposed assessment district. The failure to include the amount of money to be raised by the assessment, and the minor defect in the description of affected properties, did not hamper appellants' ability to appear and be heard. Nor did the failure to include the amount to be raised have any effect on the purpose of the notice – to inform the public of the hearing. A reader of the notice would understand that an assessment was being considered, that the amount of the assessment varied from $12 to $300, and that he could protest by following the instructions in the notice. Appellants therefore do not have standing to complain about supposed technical deficiencies in the published notice.

In any event, all registered voters within the proposed assessment district actually received mailed notice of the pending assessment when an advisory vote on the matter was taken in the June 7, 1994, primary election. The voter information pamphlet sent to all voters described the proposed assessment and noted that public hearings would be held on the assessment. The analysis of the measure included the following description of the Open Space Authority district boundaries: "The boundaries of the Authority include the cities of Campbell, Milpitas, Morgan Hill, San Jose, Santa Clara, and the unincorporated areas of Santa Clara County not currently within the Midpeninsula Regional Open Space District or its sphere of influence." The pamphlet included appellants' statement of opposition to Measure A, and included their names and the name of their organization. This was an additional notice method calculated to give actual notice to affected property owners.

OSA's notice substantially complied with statutory requirements. There was no showing that minor technical defects in the notice prejudiced appellants.

B. Constitutionality

Appellants complain that the method of notice used by OSA violated their constitutional due process rights. After much study we have concluded that appellants are mistaken.

It is true that procedural due process principles require reasonable notice and an opportunity to be heard before the government may deprive a person of a significant property interest. (See, e.g., *Fuentes v. Shevin* (1972) 407 U.S. 67, 87.) However, in analyzing a due process issue, this court must recognize the distinction between legislative and adjudicative actions. A formal hearing is required by the Constitution when an action of the government affecting property or liberty is adjudicatory in nature. When the action is legislative, however, there is no constitutional right to individualized notice of hearing.

The difference between legislative and adjudicative actions was first described by the United States Supreme Court in *Bi-Metallic Co. v. Colorado* (1915) 239 U.S. 441. The Supreme Court held that an assessment increasing the tax valuation of all property in Denver by forty percent was not subject to due process. Justice Holmes stated: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state constitution had declared that Denver had been undervalued as compared with the rest of the State and had decreed that for the current year the valuation should be forty per cent higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. *There must be a limit to individual argument in such matters if government is to go on.*" (*Id.* at p. 445, emphasis added.)

Justice Holmes had authored an earlier Supreme Court case which held that assessments of property owners on a single street in Denver were entitled to a due process hearing. In *Londoner v. Denver* (1908) 210 U.S. 373, 374, a small number of property owners were exceptionally affected individually by a proposal to pave a street. In that case the small number of property owners who were affected by an adjudicative action had a right to due process. Even in *Londoner,* the court found that published notice was sufficient under the due process clause, but found a due process violation in that the promised hearing was never scheduled. (*Id.* at pp. 380-381.)

"[T]he pragmatic considerations identified by Justice Holmes in *Bi-Metallic* . . . are as weighty today as they were in 1915." (*Minnesota Bd. for Community Colleges v. Knight* (1984) 465 U.S. 271, 285.) The Supreme Court in the Minnesota case stated that in *Bi-Metallic* large numbers of landowners were affected and it would have been impracticable to provide a formal due process hearing for each one. (*Ibid.*) Respondents and amici argue that the action of the Open Space Authority was legislative in nature, not an adjudicative action that singles out a small number of property owners on individual grounds.

Thus we begin our due process analysis by examining the question of whether OSA's action was adjudicative or legislative in character. This determination depends on the character of the action rather than its label. (*Halverson v. Skagit County* (9th Cir. 1994) 42 F.3d 1257, 1259.) "[G]overnmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient. [Citation.]" (*Id.* at p. 1261.) In *Halverson* due process was satisfied by publication and public hearing concerning the creation of a county diking system to prevent floods. In *Knox, supra,* 4 Cal.4th at pages 141-142 the court held that the creation of an assessment district for the purpose of park maintenance under the LLA was the result of a legislative process. Another example is *Dawson, supra,* 16 Cal.3d at page 683, in which the court held that the establishment of a special assessment district to pay for access to a neighboring town's sewer system was the result of a "peculiarly legislative process." Finally, in *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 211-213, the California Supreme Court held that the passage of a zoning ordinance by a city was a legislative act, not an adjudicative one. The court stated that because the action was unquestionably a general legislative act, there was no due process right to hearing and an opportunity to be heard. (*Ibid.*)

Although appellants contend that a higher level of notice is required for special assessments on property, there are no constitutional due process notice requirements when an action is legislative. (*Bookout v. Local Agency Formation Com.* (1975) 49 Cal.App.3d 383-387.) In *Bookout* the Local Agency Formation Commission of Tulare County (LAFCO) and the city of Visalia appealed from a judgment granting a writ of mandate which enjoined the city and LAFCO from approving an annexation of property until all the affected landowners were notified by registered or certified mail or by posting the affected property. Bookout was one of the property owners affected by the annexation proposal. (*Id.* at p. 385.) Bookout did not see the published notice or know of the annexation hearing until after it had occurred. Only a notice of the LAFCO hearing containing a metes and bounds description of the area to be annexed was published. The court held that it had been settled by a long and unbroken line of case authority that the matter of forming and adding new territory to municipal corporations, like cities and towns, and the extent and character of the territory to be included, were legislative matters which the Legislature has delegated to local municipalities to be performed in accordance with appropriate legislative acts. (*Id.* at p. 386.) Because the annexation does not deprive owners of the annexed area of property or property rights in the constitutional sense, the Legislature could have omitted provisions for notice or hearing altogether. (*Id.* at p. 387.) The notice need only comply with the statutory particulars. (*Id.* at p. 386.)

In the instant case OSA published notice according to the statutory requirements of Government Code section 54954.6(c)(4). OSA complied with the statutory procedures for holding a public hearing and adopting an assessment. When the legislative body follows all the requirements of the statutory procedure, all the process that is due has been afforded to those affected.

The cases relied upon by appellants are distinguishable. In *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, a common trust fund had been organized under the New York Banking law. That is to say, many trusts involving many beneficiaries were pooled together as an investment vehicle. (*Id.* at pp. 307-309.) There were 113 trusts with an unknown number of beneficiaries, not all of whom were residents of New York State. The bank applied to settle the first account as trustee. (*Ibid.*) The bank gave notice only by newspaper publication once a week for four weeks, naming in its notice the bank and the lists of trusts and estates that were involved in the common trust fund. (*Id.* at pp. 309-310.) Appellant Mullane was appointed special guardian and attorney for all persons known or unknown not otherwise appearing. (*Id.* at p. 310.)

Appellant appeared specially objecting that "notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree." (*Id.* at p. 311.) The United States Supreme Court reasoned that when one may be deprived of property, due process requires notice and an opportunity to be heard "appropriate to the nature of the case." (*Id.* at p. 313.) Here, if the final account were accepted, rights regarding the negligence of the trustee might have been cut off, or fees could have been awarded that diminished a beneficiary's interest. The proceeding threatened a deprivation of property, so a certain standard of notice had to be observed. (*Ibid.*) The court stated: "But when notice is a person's due, process which is a mere gesture is not due process." (*Id.* at p. 315.)

The court held that as to unknown beneficiaries or known beneficiaries with unknown addresses, the statutory notice, that is, notice by publication, was constitutional. (*Id.* at p. 318.) The court held that as to known present beneficiaries of known place of residence, notice by publication was inadequate, not because it failed to reach everyone, but because under the circumstances it was not reasonably calculated to reach those who could easily be informed by other means at hand. "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." (*Ibid.*) Clearly *Mullane* involved a proceeding that was adjudicative in nature. The court in New York was going to make orders about trusts affecting an identifiable, finite number of beneficiaries. The court said about the words of the due process clause that "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." (*Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at p. 313.)

In *Walker v. Hutchinson City* (1956) 352 U.S. 112, the city condemned part of Walker's property in order to widen a city street. (*Id.* at pp. 112-113.) The city filed a court action to appoint commissioners to determine compensation for the property taken and any other damage suffered. (*Id.* at p. 113.) The commissioners had to give 10 days notice of the time and place of the proceedings, and notice could be given either in writing or by publication in the official city paper. (*Ibid.*) In Walker's case the notice was by publication and the commissioner fixed his compensation at $725, and the 30 day appeal period duly ran. (*Id.* at pp. 113-114.)

Walker brought an equitable action arguing that he knew nothing about the condemnation proceedings until after the time for appeal had passed. (352 U.S. at p. 114.) The court stated: "The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases." (*Id.* at p. 115.) The court noted that *Mullane* established the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. There is no rigid formula, and the notice required will vary depending on the circumstances and conditions. (*Ibid.*)

The Supreme Court held that the notice given *Walker* fell short of the requirements of due process. (352 U.S. at p. 116.) "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property." (*Ibid.*) It was unclear in this case why direct notice could not be given to appellant, whose name and address were clearly known to the city. A letter would have apprised him that his property was about to be taken and that he should appear if he wanted to be heard on its value. If the owner were a resident of a different state that would present a different problem. (*Id.* at p. 116.)

Thus, the United States Supreme Court reversed the judgment of the Supreme Court of Kansas, stating: "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use." (352 U.S. at p. 117.)

Walker is distinguishable because of the adjudicative nature of the case. The case involved condemnation proceedings under the Fifth Amendment, a different animal than assessment proceedings. In *Walker* the contemplated governmental action was the taking of an individual's property without giving him notice or an opportunity to be heard on the amount he should be paid therefor. There is basically no similarity to the instant case.

Firestone Tire & Rubber Co. v. Board of Supervisors, supra, 166 Cal.App.2d 519, was an annexation case, not an assessment case. In that case property of the Firestone Company was annexed to a fire protection district without any actual notice to Firestone. (*Id.* at p. 524.) Firestone discovered the annexation when it received the tax bill. After Firestone's land was annexed to the district, the state legislature passed an act validating all annexation proceedings completed earlier, other than those as to which legal proceedings were pending. (*Id.* at p. 525.) A month or so after the act was passed Firestone filed a petition in court challenging the annexation. In passing the appellate court had said: "*If* the owner of property within the proposed annexation had a constitutional right to notice and an opportunity to be heard, the notice herein given did not satisfy the constitutional requirements of due process." (*Id.* at p. 527, emphasis added.) The notice was published in a newspaper that was not one of general circulation and had no subscribers and was not distributed in the area where the annexed property was. On the other hand, the owner of property may be taxed or assessed, without notice or an opportunity to be heard, for the state to perform its essential functions such as fire protection. (*Id.* at p. 529.) In any event, Firestone did not bring its court challenge until after the Validating Act was passed, and then Firestone asked the board to remove it from the district, thereby impliedly recognizing the board's authority to annex. For those reasons, the court held the annexation valid. (*Id.* at p. 531.) The court also noted that the legislature could have provided for annexation without notice or hearing. (*Id.* at p. 530.)

In *Meadowbrook Manor, Inc. v. City of St. Louis Park* (1960) 104 N.W.2d 540, the appellant was assessed $44,000 plus for his share of a sanitary sewer facility of which he had no actual notice. (*Id.* at p. 541.) Notice to the owner was given by publication although the property owner was a non-resident. The court applied *Mullane* and held that the notice to this particular owner required more than published notice. The court balanced the nature of the right as being substantial when measured against the burden on the proceedings of mailed notice. Implicit in the decision is that the matter was not legislative in character and did not affect a broad class of persons. The court noted that it would be impossible to set up a rigid formula as to the kind of notice that must be given; the notice required will vary with circumstances and conditions. (*Id.* at p. 544.) On those facts, the court noted that mailing notice to the appellant would place no onerous burden on the taxing authorities. (*Id.* at p. 545.) *Meadowbrook,* then, involved a single property owner, and not a class of persons like the instant case.

Finally we turn to the Wisconsin Electric Power Company cases and the import attributed to *Wisconsin Electric Power Co. v. City of Milwaukee* (1957) 352 U.S. 948, 958 by the *Meadowbrook* court. None of the three reported decisions by the Wisconsin Supreme Court included any discussion of the facts, the amount of the assessment, or the burden on the agency of providing notice. (See (1953) 56 N.W.2d 784, (1956) 76 N.W.2d 341, (1957) 81 N.W.2d 298.) Nor did the U.S. Supreme Court address the facts in its *per curiam* decision; it merely vacated the decision of the Supreme Court of Wisconsin and remanded the case for reconsideration in light of *Walker v. Hutchinson City, supra,* 352 U.S. 112. The *Meadowbrook* court observed: "The decision of the U.S. Supreme Court in the Milwaukee case is *per curiam* and does not by its language provide reasoning which extends the *Mullane* and *Walker* authorities to special assessment proceedings." (*Meadowbrook Manor, Inc. v. City of St. Louis Park, supra,* 104 N.W.2d at p. 544, emphasis added.)

To sum up why appellants' cases are distinguishable, there are basically two reasons. The first would be that some of the cases involved adjudicative actions that involve individuals or small numbers of people, who, under the circumstances, are entitled to individualized notice. The second reason is a corollary of the first. Because small numbers of people are involved, it is feasible to give individual notice by mail. In other words, when great numbers of people are involved and the action is legislative, one can imply that the kind of notice that is required might vary with the circumstances and conditions. (See *Walker v. Hutchinson City, supra,* 352 U.S. at p. 115.) We conclude that because the open space assessment here is legislative in character, due process was satisfied by the agency's publishing the notice in accordance with statutory requirements. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-613.) "[O]nly those governmental decisions which are *adjudicative* in nature are subject to procedural due process principles. *Legislative* action is not burdened by such requirements. (*Id*. at p. 612, citing *Mullane* and other cases, emphasis in original.)

II. Removal of 10,000 Parcels

The parties agree that OSA's published notice of the July 20, 1994, hearing improperly described the assessment district, omitting 10,000 parcels that OSA meant to include. Thus, when notice was republished, it was impossible to give the proper 45-day statutory notice to those landowners. Because OSA wanted to meet the assessor's August deadline for imposing the assessment that same year, it decided to exclude those 10,000 parcels for the moment, and to annex them later.

On appeal appellants complain that the exclusion of those parcels, so that their protests would not be counted toward the majority needed to defeat the assessment, violated their due process rights. Furthermore, argue appellants, removal of the parcels was not based on a determination of no benefit, but rather on a desire to meet the assessor's deadline. Appellants say that removing benefiting parcels from the assessment district constituted a prejudicial abuse of discretion in violation of the 1972 Act.

At the public hearings, however, appellants had taken a different tack. The head of the SCCTA argued that the 10,000 parcels should be excluded from that year's roll, because the proper notice was not given.

Appellants' characterization of the purpose for not including the misclassified parcels as making sure those protests would not count, is unsubstantiated in the record. It appears to us that through an innocent clerical error certain parcels which the Authority intended to include in the assessment district were not included under the first published notice. Because the Authority could not meet its other deadlines, and also give proper statutory notice to the owners of those 10,000 parcels, it decided to annex them later. There was nothing nefarious, immoral, or illegal about this process, and we do not see that it in any way constitutes a prejudicial abuse of discretion. (Sts. & Hy. Code, § 22509.)

Appellants are really asserting on behalf of those persons not in the district that there is a denial of due process to appellants because the protest votes of others could not be counted toward the majority needed to defeat the assessment. The process that is due, however, is the opportunity to have a hearing and to voice objections. (*Halverson v. Skagit County, supra,* 42 F.2d at p. 1260.) The right to protest is not a fundamental right guaranteed by the due process clause. (*County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863, 876.) Rather the right to protest is a [sic] purely a creature of statute. (*Erven v. Board of Supervisors* (1975) 53 Cal.App.3d 1004, 1015; *County of Riverside v. Whitlock, supra,* 22 Cal.App.3d at p. 875.) Most importantly, appellants have failed to show how they are adversely affected. (Sts. & Hy. Code, § 22509.)

Appellants are ignoring a fundamental principle regarding special assessments and assessment districts. By statute, the creating legislative body may within its discretion order the inclusion of territory in or may order the exclusion of territory from the proposed district. (Sts. & Hy. Code, § 22591.) Establishment of a special assessment district results from a peculiarly legislative process. (*Knox, supra,* 4 Cal.4th at p. 146.) Or as stated in another case, allowing appellants' claim "could defeat the very purpose for which the improvement district was formed *and would impinge on the legislative body's prerogative to fix the district's boundaries.*" (*Kalashian v. County of Fresno* (1973) 35 Cal.App.3d 43, 50, emphasis added.) The contention that benefited property has been omitted from the assessment is not sufficient to invalidate the whole assessment. (*Larsen v. San Francisco* (1920) 182 Cal. 1, 16.)

We agree with OSA's position that the agency's decision not to include certain parcels does not implicate due process. Appellants must show that excluding the parcels made a difference. They would need to show that if the protests from the 10,000 parcels had been included, that there would have been a majority protest. The protest summary indicates there were 471 protests from outside the district including the excluded 10,000 parcels. If those were added to the 21.3 percent who protested there would still not have been a majority protest. There was no showing that appellants were prejudiced by the exclusion of the 10,000 parcels.

III. Denial of Equal Protection to Viewshed Property Owners

Appellants contend that the superior court erred when it found that appellants' equal protection rights were not violated by the open-space acquisition priorities established by the Legislature. The acquisitions proposed by OSA, argue appellants, irrationally prefer valley dwellers by earmarking the land of owners in the surrounding hillsides for acquisition. Appellants argue this is a denial of equal protection. The statute itself provides that open-space acquisition should be focused on lands closest, most accessible, and visible to the urban area, such as the remote ranchlands east of the westernmost ridge of the Diablo Range. (Pub. Resources Code, § 35152.) This is really a complaint that the government may take the property of certain landowners, and this has nothing to do with our analysis which focuses on whether there is a benefit to the assessed properties and whether that benefit is proportional to the assessment.

Unless a suspect classification is involved or an infringement of a fundamental interest is alleged, in ordinary equal protection cases a classification is upheld if it bears a rational relationship to a legitimate state purpose. (*Weber v. City Council* (1973) 9 Cal.3d 950, 958-959; *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 373-374; *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 477-478.)

A governmental entity can classify property for parkland use on the basis of its location where there is a rational and clear basis for doing so. The Legislature determined that for the purpose of creating a greenbelt space in Santa Clara County, land acquisition priorities are for viewshed properties as defined above in section 35152 of the Public Resources Code.

The Legislature's decision to make viewshed property the highest priority for acquisition is rationally related to creating a greenbelt because it is the property which can be most easily used and appreciated, both from a practical perspective of physical access, and from an aesthetically pleasing aspect of being within sight of the hundreds of thousands of people who live or work in the urban valley area. We think that it is not arbitrary to define viewshed as the hillsides when the valley is the area that is most heavily populated both by residents and workers. The cases relied upon by appellants are distinguishable.

Appellants' complaint is really a thinly disguised discriminatory "takings" argument. Assessment district validation and the takings issue are unrelated and should be treated separately. (*Duncan v. Ramish* (1904) 142 Cal. 686, 693-694.)

IV. Interference with Appellants' Right to Protest

Appellants complain that the exclusion of the 10,000 parcels, not because they did not benefit but because there was not time to give those landowners statutory notice, interfered with their right to mount an effective protest. Appellants also claim that they had difficulty finding out from respondents which were these 10,000 parcels. We agree with respondents that appellants have not met their burden.

As previously discussed, the legislative body may change the boundaries of the district and exclude territory therefrom during the hearings, according to statute. (Sts. & Hy. Code, § 22591.) *Downtown Palo Alto, supra,* 180 Cal.App.3d at p. 398, requires appellants to show that proper notice would have permitted a viable protest to be mounted in order to satisfy the burden of proof. In that case the court held that appellants had not demonstrated that business owners who were not notified would have joined the protest in sufficient numbers to have caused the city council to vote down the measure. (*Ibid.*) Appellants here also fail to demonstrate the same causal connection.

Appellants must show that they have been misled in a substantial way by the notice given. The reasoning of the court in *Downtown Palo Alto,* can also be applied here: "Noting the presumption of regularity and legality of official action as well as the petitioner's burden to establish the invalidity of the ordinance, the court also concluded: 'If petitioner was misled in any substantial way by the notice in question or if he was not present at the hearing, it was necessary for him to show the fact in his petition: as he has not done this the presumption of lawful action is not overthrown and his petition was properly denied.' " (180 Cal.App.3d at p. 397, citing *De Luca v. Board of Supervisors* (1955) 134 Cal.App.2d 606, 611.)

Since appellants attended each hearing and protested the levy of the benefit assessment, they cannot show they were misled in any substantial way. Appellants alleged that they mailed 7,500 letters notifying parcel owners of their right to protest. A review of the transcripts reveals that about 25 people testified before the mailing and 77 people testified after the mailing. The record does not support the conclusion that once there was notice by mail that a groundswell of opposition erupted to OSA. The due process concern here is the right to be heard and appellants exercised that right at several hearings. The complaints over protest proceedings do not go to the issue of due process, as protest rights are merely creatures of statute. (*Erven v. Board of Supervisors, supra,* 53 Cal.App.3d at p. 1015.) In fact, the public survey that was conducted, the successful election, and the low protest vote all support the conclusion that the residents of the Santa Clara County Open Space Authority would like to preserve open space and are willing to pay $12 apiece to achieve it. On this record it cannot be said that different notice would have made a successful protest probable. Under the circumstances appellants have not shown that the combined effect of the published notice and the exclusion of certain properties violated any of their rights.

V. Engineer's Report and Initiating Resolution

In this fifth assignment of error appellants claim that the court erred in granting summary judgment to OSA on the fifth cause of action because the Engineer's Report violated the LLA. (Sts. & Hy. Code, § 22500 et seq.; Statutory references in this section are to the LLA in the Sts. & Hy. Code.) Appellants claim that the Engineer's Report was deficient because it did not specify for the first year of the assessment what the costs of the improvements would be, or give a diagram of the assessment district or assess the estimated cost of improvements, or give an estimate of the principal amount of bonds or notes, all requirements under section 22567. Appellants also urge that the initiating resolution did not comply with the LLA because it was not sufficiently detailed. (§ 22585.) The trial court found with respect to this claim: "The engineer's report meets the statutory requirements in that: (1) the administrative record does not reveal an abuse of discretion in determining proportional benefit to the parcels to be assessed [*Knox*]; (2) the report describes the general nature, location, and extent of proposed improvements (Sts. & [Hy. Code,] § 22568); and (3) the diagram of the district is sufficiently detailed by reference to the county assessors and the assessment roll (Sts. & [Hy. Code,] § 22571.)"

Appellants claim that prior to the levy of any assessment that the proposed improvements, including open space, must include "detailed plans and specifications." The LLA does not require the specificity advocated by appellants. It provides that the plans and specifications "need not be detailed, but shall be sufficient if they show or describe the general nature, location, and extent of the improvements." (Sts. & Hy. Code, § 22568.) For purposes of acquiring open space, the statute simply does not require that each and every specific acquisition of open space be identified in advance.

Contrary to appellants' contention, this statutory structure does not violate the basic purpose of an assessment district. The acquisition of open space was shown in the engineer's report to confer a benefit in proportion to the assessment. Common sense supports the view that the acquisition or preservation of open space in the vicinity or within the view of one's property will confer a benefit on that property. While the OSA board did not rely exclusively on the expert testimony of the engineer, it could have done so according to *Dawson, supra,* 16 Cal.3d at pages 688-689.

Appellants here complain that the plans and specifications for the improvements were inadequate or lacking. In *Dawson,* however, the court approved an improvement consisting of acquisition of rights in existing sewer facilities for which no plans or specifications were necessary. (*Id.* at p. 687.) The Dawson court also approved an assessment for facilities not yet planned. "The fact that [sewage facilities] are not presently in existence and in fact have not yet reached the planning state does not detract from the legislative judgment that such facilities will be necessary in the foreseeable future and that a necessary prerequisite to their installation is the acquisition of capacity rights in the Palo Alto system. [Citations.]" *Id.* at p. 689.) Similarly, in the instant case, exactly what property can be acquired first is a matter that is in the planning stage, but it does not detract from the legislative judgment that acquisition will be necessary to improve the quality of life for county residents in the future. In this case there was no expert testimony contradictory to that of the OSA engineer, and the opinion of the assessment engineer is to be given great weight. (*Id.* at p. 689, fn. 15.)

Appellants complain that the diagram of the assessment district is inadequate for various reasons. There is substantial evidence that the diagram is adequate. The engineer stated that county counsel viewed the map as sufficient. Then he stated: "However, I can tell you from my experience in having worked with well over a hundred assessment districts, that for a city-wide or countywide assessment district, the map shown in the engineers [*sic*] report is typical of the level of detail in referring property owners to the assessment roll to determine whether their parcel is in or out of the Assessment district. [¶] The reason that is done is because to prepare a map that was parcel specific for 300,000 parcels would have caused the budget for this project to be many times what it was." Uncontroverted testimony of an expert is determinative. (*Dawson, supra,* 16 Cal.3d at p. 689.)

Moreover a diagram, not a map, is required. The diagram generally must show the exterior boundaries of the assessment district and should show the lines and dimensions of each lot or parcel within the district. But it is permissible for the diagram to refer to the county assessor's maps for detailed descriptions of the lines and dimensions of any lots or parcels. (Sts. & Hy., §§ 22570, 22571.) The statute does not require that distinctive parcel numbers actually appear on the diagram. If a landowner wondered whether his parcel was going to be assessed, he could simply look up the parcel number in the assessment roll. The record and the assessment roll were available to the public. The notice invited owners to review the Engineer's Report which incorporated the assessment roll, or to call the staff member at the telephone number listed therein. Appellant's challenge to the sufficiency of the diagram is not supported by the evidence. We shall uphold the trial court's determination on this issue.

Appellants also challenge the adequacy of the initiating resolution. However this challenge is raised for the first time on appeal. On appeal we can only consider issues which have been adjudicated below. (*Damiani v. Albert* (1957) 48 Cal.2d 15, 18.)

VI. Assessment District as CEQA Project

The California Environmental Quality Act (Pub. Resource Code, § 21000 et seq., [CEQA]) is the legislative effort to interpose a mandatory level of institutional concern for the environment into public agency decision making. Essentially CEQA requires government agencies to prepare reports on how a project will affect the environment, with an eye to mitigating significant effects of such projects when possible. Some projects fall into an exempt category, while others require studies of the significant environmental effects. The initial study may be followed by a negative declaration, saying that there are no significant effects. If a project may have significant effects on the environment, a full environmental impact report must be prepared. (*Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 470, hereafter simply Kaufman.)

Appellants contend the trial court erred in finding that the formation of an assessment district to fund the purchase of open space is not a project within the meaning of CEQA. This court has considered a similar issue, whether a school district's formation of a community facilities district to raise revenue is or is not a project within the meaning of CEQA. (See *Kaufman, supra,* 9 Cal.App.4th at p. 470.) We held that the mere formation of a community facilities district, without further action regarding how the money is to be spent, is not a project within the meaning of CEQA. (*Id.* at p. 476.) Also, under the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.), the creation of a government funding mechanism which does not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment is defined as not a CEQA project. (Cal. Code Regs., tit. 14, § 15378, subd. (b).)

Appellants' reliance on *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521 is misplaced. The redesignation of a parcel of land from residential to industrial by an amendment to a city's general plan, may be a project within the meaning of CEQA. It seems fairly clear that a zoning decision that permits higher density development is the sort of governmental decision that will indirectly affect the environment, and thus should be subject to CEQA – indeed, that was the holding in the case. The instant case is distinguishable. OSA has no authority over land use decisions, it only has a limited and special purpose to preserve and create a greenbelt to counter the continuing and serious conversion of land to urban uses. Appellants' contention is without merit.

VII. Fraud and Abuse of Discretion Claims

Appellants complain that the court erred in granting summary judgment to OSA on their eighth cause of action alleging fraud and arbitrary action amounting to an abuse of discretion. We find the trial court did not err.

Assessment proceedings may be attacked on the basis of fraudulent conduct or arbitrary and unreasonable acts amounting to an abuse of discretion. (*Maxwell v. City of Santa Rosa* (1959) 53 Cal.2d 274; *Lawrence y. City of Santa Rosa* (1959) 53 Cal.2d 282.) Appellants complain that the Engineer's Report was deficient in not identifying specific parcels, not describing the location or extent of proposed improvements for the fiscal year, and so forth. Also appellants complain that the published notice did not provide adequate notice of what property was subject to the assessment nor did it state the estimated amount of revenue to be raised by the levy. These acts and others evidence a predetermination on the part of OSA to adopt the assessment, according to plaintiffs, regardless of any investigation of the benefit to the assessed properties.

Similar arguments have been made and rejected by the courts. For instance, in *White v. County of San Diego* (1980) 26 Cal.3d 897, 903, the plaintiffs, property owners assessed a levy by the county to pay the costs of widening an adjacent road, complained that even though the board went through the correct formal process, plaintiffs were not accorded a fair hearing because the board had pre-judged certain critical issues. For instance, they had formulated the plan to assess owners for construction costs on a front per foot basis, and for right of way costs measured by the amount paid for the strip taken from each assessed parcel. The appellate court found the contention to be without merit, noting that setting up a special assessment district is inherently a legislative process, citing *Dawson, supra*. 16 Cal.3d 676.

Appellants rely on *Maxwell* and *Lawrence*, the two cases involving the City of Santa Rosa just cited. Those cases are pleading cases, and seem to be dated, although Witkin cites to them saying a fraudulent assessment may be collaterally attacked. (9 Witkin, Summary of Cal. Law (9th Ed. 1989) Taxation § 26, pp. 41-42.) All this is well and good, and we believe that an assessment may still be attacked on such a basis. However, on a summary judgment motion, the court was to the point of looking to see if there was a triable issue of fact, and/or evidence supporting a genuine dispute as to a material fact, so that the issue should be reserved for a trial. We have not seen any evidence in the record to support appellants' contentions that OSA was motivated by fraud or engaged in conduct so arbitrary and capricious as to amount to an abuse of discretion.

Modern courts are reluctant to delve into lawmakers' motivations for enacting certain legislation. The court in *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726 quoted from Justice Fields' opinion in *Soon Hing v. Crowley* (1885) 113 U.S. 703, 710-711 " '[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, . . . The motives of the legislators . . . will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducement for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.' " That a legislator is interested in the issue and had discussed it with other members of the public before he reaches the meeting at which he votes on the proposal is normal and does not mean he has some illicit prejudice, which again courts are in a poor position to discern. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780; see also *Todd v. City of Visalia* (1967) 254 Cal.App.2d 679, 691.)

In summary there was no sufficient evidence in this case to raise a genuine dispute as to the existence of arbitrary conduct or fraud so as to reach the threshold of requiring a trial. The trial court did not err in granting summary judgment on this cause of action.

VIII. Special Assessment as Void Because Special Tax

In their eighth assignment of error appellants complain that the trial court incorrectly ruled that the special assessment was a special assessment and not a special tax. The trial court held: "Neither the face of the administrative record nor judicially noticeable facts establish that the assessment is not in proportion to the benefits bestowed on the properties assessed or that no benefits accrued to such properties. Therefore the assessment does not amount to a tax requiring compliance with Art. XIII A of the California Constitution. (*Knox v. City of Orland*[, *supra*,] 4 Cal.4th 132.)"

In reviewing this issue, we must keep in mind the limited standard of review applicable to legislative decisions such as the one that roughly half the households in the county benefit from preservation of this particular open space. If the assessed properties benefit from the proposed public improvement, then the levy is of an assessment and not a special tax. The agency's determination of benefit to properties is conclusive unless absence of benefit clearly appears from the record or judicially noticed facts. (*White v. County of San Diego, supra*, 26 Cal.3d at p. 904; *Dawson, supra*, 16 Cal.3d at p. 684.)

It appears that the boundary lines were drawn to exclude certain property that did not benefit and to include property that did benefit from the proposed acquisition of open space. OSA determined the boundaries of the district based on the conclusion that any open space within the district would benefit the properties within the district in one or more of the following respects: "(1) Increased attractiveness of the community for development or redevelopment as a result of the preservation of mountains, foothills and canyons, and increased public access to these lands; (2) Improved quality of life by protecting and preserving the district's irreplaceable open space lands, and rare and endangered plants and animals; (3) Improved air and water quality, capacity of roads, transportation and other public infrastructure systems as a result of more evenly dispersing open space and recreation areas and facilities throughout the district; (4) Improved recreational opportunities and expanded access to open space and recreation areas and facilities for all properties within the district; (5) Expanded employment opportunities and increased economic activity; and (6) Increased economic value of improved property due to increased capacity to draw businesses, home buyers, tourists and others to the district."

The studies relied upon by OSA, found in the administrative record, include studies which show that property appreciates with the presence of open space. For instance, one recent study calculated that preservation of wetlands in San Francisco "would provide $4 million in direct benefits and would increase the value of surrounding property by $80 million [dollars]." Presence of hillsides or a lake or a river or nearby open space may cause real property to appreciate in value. Open space saves millions of taxpayer dollars by its capacity to absorb storm water, provide natural drainage and natural streams to supplement extended sewer systems. The studies generally indicate that substantial property value is realized when an area's unique topographical features are preserved, and that surrounding properties benefit as well. We found no contradictory evidence in the record to show that permanent preservation of open space and creation of recreational areas within the district would not contribute to increasing property values by at least $12 per year per parcel. Proximity of property to open space is contemplated by the description of the improvement which includes the purpose of acquiring open space throughout the district.

Principles found in *Knox, supra,* 4 Cal.4th 132 are dispositive. In that case the California Supreme Court affirmed an assessment to pay for park improvements. There an assessment of $24 for each dwelling unit within the assessment district, which included all of the City of Orland and portions of the county, was determined by simply dividing the number of dwelling units in the assessment district into the cost of the park improvements. (*Id.* at p. 137.) Despite the fact that some of the properties assessed were some 20 miles outside the city, the California Supreme Court affirmed the imposition of the assessment. (*Id.* at p. 149, fn. 25.)

In *Knox, supra,* the appellants contended that the $24 charge for park maintenance was a special tax requiring two-thirds voter approval, rather than a special assessment, the same argument that is made here. The California Supreme Court noted that amendments to the Constitution, such as Article XIII A, were not intended to limit traditional benefit assessments. The limitation on local entities' ability to impose special taxes does not extend to special assessments. (4 Cal.4th at p. 141.) The court reviewed the difference between a special tax and a special assessment. (*Ibid.*) A special assessment is "a compulsory charge placed by the state upon real property within a pre-determined district, made under expressed legislative authority for defraying in whole or in part the expense of a permanent public improvement therein . . . [Citations.]" (*Id.* at pp. 141-142.) It is levied against real property that is particularly and directly benefited by the improvement. The assessed property receives a special benefit over and above that received by the general public, thus, the general public should not be required to pay for these special benefits for the few, and the few specially benefited should not be subsidized by the general public. (*Id.* at p. 142.)

A tax on the other hand is very different, and may be levied without reference to particular benefits to particular individuals or property. Indeed, in taxation one expects imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure and who are not responsible for the condition to be remedied. The same is true of a special tax which is a tax levied to fund a specific governmental project or program; it need not specifically benefit the taxed property, unlike a special assessment. (*Ibid.*) Plaintiffs contended the special assessment for park maintenance was essentially an end run around article XIII A and the special tax two-thirds vote requirements. The California Supreme Court disagreed. (4 Cal.4th at pp. 143-144.) In California parks have long been considered proper subjects for special assessment. (*Id.* at p. 144.) The court went on to find that on the face of the record there was no showing that the cost of the improvement had been improperly apportioned to the parcels of land in the assessment district. (*Id.* at p. 148.) The court stated: "In summary, the record fails to establish that the assessment in question, as finally confirmed, is not proportional to the benefits bestowed on the properties assessed or that no benefits accrue to such properties. Under *Dawson, supra,* 16 Cal.3d 676, the city's determination of benefit, as set forth in its resolution approving the engineer's report, must be deemed conclusive in the absence of any contradictory evidence in the record." (4 Cal.4th at p. 149.)

The same may be said in the instant case. Imposition of a special assessment for open space is an assessment and not a special tax. There was no requirement for two-thirds approval by voters. The boundary lines of the district were drawn to include land that would be benefited by the targeted acquisition of specific open space throughout the entire district. The engineer's finding that each residential parcel in the district would benefit equally, and that all benefited, must be deemed conclusive since there is no contradictory evidence in the record. The trial court properly ruled that the special assessment was not a special tax.

IX. Compliance with the LLA

Appellants complain the judgment determining that excluding parcels east of the ridgeline was supported by evidence in the record was erroneous. Furthermore appellants complain that the diagram of the assessment district was improper because it did not show exterior boundaries or the lines and dimensions of each lot or parcel within the district or identify each lot by number or letter.

The record shows that OSA was mindful of the Mello Bill which made legislative declarations concerning the remote nature of certain parcels. That is to say, the Legislature provided in the enabling legislation for the Santa Clara County Open Space district that priority for open space acquisition should be focused on lands nearest the urban area and that remote ranchlands east of the westernmost ridge should be conserved only through easement purchases. Again, the engineer's opinion, both written and oral, is credible evidence. (*Dawson, supra,* 16 Cal.3d at p. 687, fn. 14.) In this case the Authority's engineer stated: "The finding being that those parcels that are east of the ridge line would not benefit from the acquisition of open space lands. And since they would not benefit, therefore, they cannot be assessed for any land acquisitions." Thus, appellants' contention that there was no proper basis for excluding properties on that side of the ridgeline is contradicted by the record. Appellants also contend the assessment district is void for failure to comply with the LLA, citing such alleged breaches as the decision to exclude certain geographic areas from the district and the claim the Engineer's Report should have contained a distinctive number or letter for each lot or parcel.

The presumption of regularity and legality of official action places upon appellants the burden to establish the specific invalidity of the action taken. (*De Luca v. Board of Supervisors, supra,* 134 Cal.App.2d at pp. 610-611.) The

Engineer's Report incorporated by reference the assessment rolls as appendix A, which listed each and every parcel by assessor parcel numbers. The LLA permits the special district to refer to each parcel by distinctive number (which it did) and to refer to the county assessor's maps for detailed descriptions of the parcels (which it did). (Sts. & Hy. Code, §§ 22570, 22571.) The Engineer's Report met all the legal requirements and the trial court so adjudicated. The trial court's ruling on this issue was correct.

X. The Propriety of OSA's Funding Mechanism

Appellants attack the trial court's judgment that "[t]he Mello Bill allows but does not require the levy of assessments to be made through the specified Improvement Acts." (Pub. Resources Code, § 35173.) Appellants contend that section 35173 of the Mello Bill authorizes OSA to levy assessments only pursuant to the Improvement Act of 1911, the Improvement Bond Act of 1915, or the Municipal Improvement Act of 1913; and that as a matter of law the 1972 Lighting and Landscaping Act should have been expressly mentioned in the Mello Bill if it was an authorized funding mechanism. Appellants' contention is not well-taken. The 1972 Act provides an independent source for the assessment for two reasons.

First, the LLA provides that notice may be given pursuant to section 54954.6 of the Government Code (Sts. & Hy. Code, § 22556). Subdivision (c) (4) of that statute provides expressly: "Notwithstanding paragraph (1), in the case of an assessment proposed to be levied pursuant to Part 2 (commencing with Section 22500 [LLA]) of Division 2 of the Streets and Highways Code by a regional park district, regional park and open-space district, or regional open-space district formed pursuant to Article 3 (commencing with Section 5500) of Chapter 3 of Division 5 of, or pursuant to Division 26 (commencing with Section 35100 [the Santa Clara County Open Space Authority Act]) of, the Public Resources Code, notice may be provided pursuant to paragraph (1) of subdivision (b)." This statutory structure in which the various sections refer to each other means that the LLA could be used by OSA. Finally, since the notice statute refers specifically to the enabling legislation for OSA, this shows that it was contemplated that OSA could use the LLA.

Second, the LLA expressly includes within the definition of local agency (those which may invoke its provisions) a city, a city and county or a special district. (Sts. & Hy. Code, § 22530.) OSA is a special district because it was "formed pursuant to . . . special act for the local performance of governmental . . . functions within limited boundaries and which is authorized by such law or act to make any of the improvements or to furnish the maintenance or services provided for in this part." (Sts. & Hy. Code, § 22539.) The enabling legislation authorizes the purchase, gift, or devise of real property in the acceptance of open space easements, and it provides that all property acquired shall be properly maintained. (Pub. Resources Code, §§ 35152, 35155.) The improvement and maintenance referred to in section 22525 of the Streets and Highways Code (part of the LLA) is quite broad and includes acquisition of open space lands. As a public body formed by a special act for open space acquisition, OSA clearly falls within the definition of special district expressly authorized to use the Landscaping and Lighting Act of 1972.

The three Improvement Acts, on the other hand, were designed, with narrow exceptions, for use only by municipal and county governments. (See, e.g., Sts. & Hy. Code, § 5005 of the Improvement Act of 1911 [defining city]; §§ 8503 and 8504 of the Improvement Bond Act of 1915 [defining city as city and county and their legislative bodies]; and § 10003 of the Improvement Act of 1913 [defining city].) Absent express authorization by the state legislature, these acts [designed for cities and counties] would not be available for use by the Open Space Authority. The conclusion that OSA is authorized to use the LLA is bolstered by a recent decision holding that a school district is a "special district" which may use the 1972 Act, although school districts are not expressly authorized to invoke the provisions of the act. (*Howard Jarvis Taxpayers Assn. v. Whittier Union High School District* (1993) 15 Cal.App.4th 730.) The holding was that the 1972 Act as passed did not limit its application to cities and counties, but extended it to "special districts" even when not expressly provided for in the enabling legislation. OSA was authorized to use the funding mechanism of the LLA.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent OSA.

/s/ Wunderlich, J.
Wunderlich, J.

WE CONCUR:

/s/ Premo, Acting P.J.
Premo, Acting P.J.

/s/ Elia, J.
Elia, J.

[Seal]

Coleman v. S.C.C. Open
H014730

APPENDIX B

Sixth Appellate District No. H014730
S066128

IN THE SUPREME COURT OF CALIFORNIA

ROBERT F. COLEMAN Et Al., Appellants

v.

THE SANTA CLARA COUNTY OPEN SPACE AUTHORITY Et Al., Real Parties In Interest

(Filed Jan. 14, 1998)

Appellants' petition for review DENIED.

GEORGE
Chief Justice

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

DATE: September 8, 1995 CASE NUMBER: CV 743113

PRESENT: HON READ AMBLER, JUDGE D. De La Vega DEPUTY CLERK ______, REPORTER M. Wyllie, BAILIFF

TITLE	COUNSEL PRESENT:
Robert F. Coleman, et al., Plaintiffs,	John H. Findley, Esq.
vs	Steven M. Woodside, County Counsel and Kathryn A. Berry, Deputy County Counsel.
Santa Clara County Open Space Authority, et al., Defendants.	

NATURE OF PROCEEDINGS:

Notice of Ruling

(Filed Sep. 8, 1995)

The Motion by Defendant for Summary Judgment or Alternatively Summary Adjudication was heard June 30, 1995.

Moving party's request for judicial notice of the compilation of data from the county assessor's maps and reports is denied, since the compilation is properly authenticated neither as a copy of a public record nor as a business record.[1] (Evid. Code §§ 1271, 1530, 1531.) Further, no presumptions of authenticity support its introduction.[2] (See Witkin, *Evidence,* §919.)

Plaintiff's request for judicial notice of the notices of hearing attached as exhibits to the complaint is granted. (Evid. Code §452(d); CRC 323(b).)

Defendant is entitled to summary adjudication of each cause of action in the complaint. Therefore, summary judgment is granted.

The standard of judicial review applicable to the Open-Space Authority (OSA) is that its actions will not be overturned in the absence of a showing that the actions taken were the result of fraud or abuse of discretion. (Sts. & Hwy. Code §22509.) Abuse of discretion is satisfied by a showing that the face of the record, or judicially noticeable facts, clearly disclose that (1) the benefits conferred are not proportional to the assessment; or (2) no benefit will accrue as a result of the assessment. (*Knox v. City of Orland* (1992) *supra,* 145-146.)

As to the 1st cause of action, notice by publication does not offend procedural due process since the decision to create the special assessment district was "quasi-legislative" in nature. Moreover, it is undisputed that defendant has substantially complied with statutory publication requirements (*Horn v. County of Ventura* (1979) 24 Cal.3d 605; Govt. Code §54954.6(b)(1)); and that the contents of the published notice complied with statutory requirements. (Govt. Code §54954.6(c)(2)[3].

---

[1] The declaration of Dennis Klingelhofer. an employee of the private firm hired to produce the engineer's report, does not suffice, since the compilation was neither in the custody of a public entity, nor authenticated by a public official having legal custody of it. (Evid. Code §§1530, 1531.) Nor did declarant have first-hand knowledge of the original data. (Evid. Code §1271.)

[2] Nor has the compilation been made a part of the record of the administrative proceedings. (See *Knox v. City of Orland* (1992) 4 Cal.4th 132, 146.)

As to the 2nd cause of action, defendant's decision to remove 10,000 parcels from assessment district was not an abuse of discretion since defendant had express statutory authority to do so without notice. (Sts. & Hwy. Code §22591.)

As to the 3rd cause of action, defendant has articulated a rational basis for the different treatment of "viewshed" and "urban" property as defined in the Mello Bill, Pub. Res. Code §35100 et seq. (*Pennell v. City of San Jose* (1986) 42 Cal.3d 365.)

As to the 4th cause of action, as discussed *supra*, defendant did not violate constitutional or statutory requirements in providing notice of hearing or in removing parcels from the assessment district.

---

[3] The parties have focused upon subd. (b)(1) in their dispute over the content of the notice. While subd. (c)(4) allows notice of Landscape and Lighting Act of 1972 (LLA) assessments to be provided pursuant to subd. (b)(1), it does not mention subd. (b)(2), which only concerns "Notice required" by subd. (b)(1). But notice of a proposed real estate assessment is, strictly speaking, required by subd. (c)(1), not subd. (b)(1). Subd. (c)(4) simply provides an alternative means of delivering the required notice.

As to the 5th cause of action, the engineer's report meets the statutory requirements in that: (1) the administrative record does not reveal an abuse of discretion in determining proportional benefit to the parcels to be assessed (*Knox v. City of Orland, id.*); (2) the report describes the general nature, location, and extent of proposed improvements (Sts. & Hwy. Code §22568); and (3) the diagram of the district is sufficiently detailed by reference to the county assessors and the assessment roll (Sts. & Hwy. Code §22571.)

As to the 6th cause of action, the Mello Bill is not beyond the scope of the LLA. ((*Knox v. City of Orland, supra,* at p. 139; Pub. Res. Code §35100 et seq.; Sts. & Hwy. Code §22500 et seq.))

As to the 7th cause of action, the creation of the assessment district does not commit the OSA to any particular course of action and so does not constitute a "project" under CEQA. (*Kauffman & Broad-South Bay, Inc.* (1992) 9 Cal.app. 4th, 464.)

As to the 8th cause of action, neither the face of the administrative record nor judicially noticeable facts show that the OSA board abused its discretion in adopting the engineer's report. (*Knox v. City of Orland,* 4 Cal.4th 132.))[4]

As to the 9th cause of action, neither the face of the administrative record nor judicially noticeable facts establish that the assessment is not in proportion to the benefits bestowed on the properties assessed or that no benefits accrue to such properties. Therefore the assessment does not amount to a tax requiring compliance with Art. XIIIA of the California Constitution. (*Knox v. City of Orland,* 4 Cal.4th 132.)

---

[4] And see *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726; and *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 772.)

As to the 10th cause of action:

1. There is no evidence in the administrative record contrary to the OSA board's determination that the territory east of the westernmost ridgeline of the Diablo Range will not benefit from the proposed improvements. (*Knox v. City of Orland,* 4 Cal.4th 132.)

2. The engineer's report meets all statutory requirements, for the reasons discussed as to the 5th cause of action. ((*Knox v. City of Orland,* 4 Cal.4th 132; Sts. & Hwy. Code §§22658, 22571.)

As to the 11th cause of action:

1. The interim board of the OSA did not exceed the authority to undertake actions preliminary to the formation of the assessment district. (Pub. Res. Code §§35123(f), 35135(d).)

2. The Mello Bill allows but does not require the levy of assessments to be made through the specified Improvements Acts. (Pub. Res. Code §35173.)

3. The OSA may invoke the provisions of the LLA as a "special district" included within the statutory definition of a "local agency." (*Howard Jarvis Taxpayers Assn. v. Whittier Union High School Dist.* (1988) 15 Cal.App.4th 730; Sts. & Hwy. Code §§22501, 22530, 22539.)

Moving party shall prepare an appropriate order. (CRC 391.)

/s/ Read Ambler
READ AMBLER
Judge of the
Superior Court

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF SANTA CLARA

PLAINTIFF	CASE NUMBER
ROBERT F. COLEMAN, et al., and THE SANTA CLARA COUNTY TAX PAYERS ASSOCIATION, a corporation	CV 743113 (Filed Sep. 8, 1995)

DEFENDANT

THE SANTA CLARA COUNTY
OPEN SPACE AUTHORITY, et al.

PROOF OF SERVICE BY MAIL OF:

[ ] TRIAL SETTING CONFERENCE ORDER

[ ] PRE-TRIAL CONFERENCE ORDER

[ ] ADDENDUM TO PRE-TRIAL/TRIAL SETTING

[ ] MEMORANDUM OF TENTATIVE DECISION

[x] OTHER /NOTICE RULING

CLERK'S CERTIFICATE OF MAILING

I CERTIFY THAT I AM NOT A PARTY TO THIS CAUSE AND THAT A TRUE COPY OF THIS DOCUMENT WAS MAILED FIRST CLASS POSTAGE PREPAID IN A SEALED ENVELOPE ADDRESSED AS SHOWN BELOW AND THE DOCUMENT WAS MAILED AT

San Jose, CALIFORNIA ON Sep. 8, 1995.

STEPHEN V. LOVE
COUNTY CLERK

BY /s/ D. de la Vega
DEPUTY

Ronald A. Zumbrun, Esq.
John H. Findley, Esq.
Nicholas Morgan, Esq.
Zumbrun, Best & Findley
2150 River Plaza Drive
Suite 255
Sacramento, Ca. 25833

Steven M. Woodside,
County Counsel
Kathryn A. Berry,
Deputy County Counsel
Office of the
County Counsel
County Government
Center
East Wing
70 West Hedding Street
San Jose, Ca. 95110-1770

APPENDIX D

§ 54954.6. Public meeting on general tax or assessment; Notice

(a)(1) Before adopting any new or increased general tax or any new or increased assessment, the legislative body of a city, county, *special district, or joint powers authority* shall conduct at least one public meeting at which local officials must allow public testimony regarding the proposed new or increased general tax or new or increased assessment in addition to the noticed public hearing at which the legislative body proposes to enact or increase the general tax or assessment.

For purpose of this section, the term "new or increased assessment" does not include any of the following:

(A) A fee which does not exceed the reasonable cost of providing the services, facilities, or regulatory activity for which the fee is charged.

(B) A service charge or benefit charge, unless a special district's principal act requires service charges or benefit charges to conform to the requirements of this section.

(C) An ongoing annual assessment if it is imposed at the same or lower amount as any previous year.

(D) An assessment which does not exceed an assessment formula or range of assessments previously adopted by the agency or approved by the voters in the area where the assessment is imposed.

(E) Standby or immediate availability charges.

(2) The legislative body shall provide at least 45 days' public notice of the public hearing at which the legislative body proposes to enact or increase the general tax or assessment. *The legislative body shall provide notice for the public meeting at the same time and in the same document at the notice for the public hearing, but the meeting shall occur prior to the hearing.*

(b)(1) *The joint notice of both the public meeting and the public hearing required by* subdivision (a) with respect to a proposal for a new or increased general tax shall be accomplished by placing a display advertisement of at least one-eighth page in a newspaper of general circulation for three weeks pursuant to Section 6063 and by a first-class mailing to those interested parties who have filed a written request with the local agency for mailed notice of public meetings or hearings on new or increased general taxes. *The public meeting pursuant to subdivision (a) shall take place no earlier than 10 days after the first publication of the joint notice pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision. Notwithstanding paragraph (2) of subdivision (a), the joint notice need not include notice of the public meeting after the meeting has taken place. The public hearing pursuant to subdivision (a) shall take place no earlier than 45 days after the first publication of the joint notice pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision.* Any written request for mailed notices shall be effective for one year from the date on which it is filed unless a renewal request is filed. Renewal requests for mailed notices shall be filed on or before April 1 of each year. The legislative body may establish a reasonable annual charge for sending notices based on the estimated cost of providing the service.

(2) The notice required by paragraph (1) *of this subdivision* shall include, but not be limited to, the following:

(A) The amount or rate of the tax. *If the tax is proposed to be increased from any previous year, the joint notice shall separately state both the existing tax rate and the proposed tax rate increase.*

(B) The activity to be taxed.

(C) The estimated amount of revenue to be raised by the tax annually.

(D) The method and frequency for collecting the tax.

(*E*) The dates, times, and locations of the public *meeting and hearing* described in subdivision (a).

(*F*) The phone number *and* address of an individual, office, or organization that interested persons may contact to receive additional information about the tax.

(c)(1) The *joint notice of both the public meeting and the public hearing required by* subdivision (a) with respect to a proposal for a new or increased assessment on real property shall be accomplished through a mailing, postage prepaid, in the United States mail and shall be deemed given when so deposited. *The public meeting pursuant to subdivision (a) shall take place no earlier than 10 days after the joint mailing pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision.* The envelope or the cover of the mailing shall include the name of the local agency and the return address of the sender. This mailed notice shall be *in at least 10-point type and shall be* given to all property owners *proposed to be subject to the new or increased assessment* by a mailing by name to those persons whose names and addresses appear on the last equalized county assessment roll or the State Board of Equalization assessment roll, as the case may be.

(2) The *joint notice required by paragraph (1) of this subdivision* shall include, but not be limited to, the following:

(A) The estimated amount of the assessment per parcel. *If the assessment is proposed to be increased from any previous year, the joint notice shall separately state both the amount of the existing assessment and the proposed assessment increase.*

(B) A general description of the purpose or improvements that the assessment will fund.

(C) The address to which property owners may mail a protest against the assessment.

(D) The phone number and address of an individual, office, or organization that interested persons may contact to receive additional information about the assessment.

(E) A statement that a majority protest will cause the assessment to be abandoned if the assessment act used to levy the assessment so provides. Notice must also state the percentage of protests required to trigger an election, if applicable.

(F) The dates, times, and locations of the public *meeting and hearing* described in subdivision (a).

(3) Notwithstanding paragraph (1), in the case of an assessment which is proposed exclusively for operation and maintenance expenses for an entire city, county, or district, or operation and maintenance assessments proposed to be levied

on 50,000 parcels or more, notice may be provided pursuant to paragraph (1) of subdivision (b) and shall include the information required by paragraph (2) of subdivision (c).

(4) *Notwithstanding paragraph (1), in the case of an assessment proposed to be levied pursuant to Part 2 (commencing with Section 22500) of Division 2 of the Streets and Highways Code by a regional park district, regional park and open-space district, or regional open-space district formed pursuant to Article 3 (commencing with Section 5500) of Chapter 3 of Division 5 of, or pursuant to Division 26 (commencing with Section 35100) of, the Public Resources Code, notice may be provided pursuant to paragraph (1) of subdivision (b).*

(d) The notice requirements imposed by this section shall be construed as additional to, and not to supersede, existing provisions of law, and shall be applied concurrently with the existing provisions so as to not delay or prolong the governmental decisionmaking process.

(*e*) *This section shall not apply to any new or increased general tax or any new or increased assessment that requires an election of either of the following:*

(1) *The property owners subject to the assessment.*

(2) *The voters within the city, county, special district, or joint powers authority imposing the tax or assessment.*

(f) Nothing in this section shall prohibit a local agency from holding a consolidated *meeting or* hearing at which the legislative body discusses multiple tax or assessment proposals.

(g) The local agency may recover the *reasonable costs of public meetings, public hearings,* and notice required by this section from the proceeds of the tax or assessment. The costs recovered for these purposes, whether recovered pursuant to this subdivision or any other provision of law, shall not exceed the reasonable costs of the public meetings, public hearings, and notice.

Added Stats 1992 ch 1234 § 2 (SB 1977). Amended Stats 1993 ch 1194 § 2 (SB 376), effective October 11, 1993.

Note – Stats 1993 ch 1194 also provides:
SEC 27. The provisions of this act are declarative of existing law.

APPENDIX E

NOTICE OF PUBLIC MEETING AND PUBLIC HEARING

Before the

Santa Clara County Open Space Authority

NOTICE IS HEREBY GIVEN that on Thursday, June 27, 1994, at 7:00 p.m. or as soon thereafter as the matter can be heard, in the Isaac Newton Senter Auditorium, County Government Center, 70 West Hedding Street, San Jose, California, the Santa Clara County Open Space Authority will hold a public meeting to hear public testimony regarding the formation of an open space assessment district and levy of assessment in a portion of Santa Clara County in accordance with Resolution No. 94-7.

FURTHER, notice is given that on Wednesday, July 6, 1994 at 7:00 p.m. or as soon thereafter as the matter can be heard, in the Isaac Newton Senter Auditorium, County Government Center, 70 West Hedding Street, San Jose, California, the Santa Clara Open Space Authority will hold a public hearing to consider the adoption of the formation of an open space assessment district and levy of assessment in a portion of Santa Clara County in accordance with Resolution No. 94-7.

District funds may be used for the acquisition and/or preservation of open space lands which are of regional significance and are within the District's boundaries. Parcels of land which may be acquired or preserved as open space or greenbelt lands may include, but are not limited to, all available land and water areas that can serve as open space in Santa Clara County which are within the boundaries of the Authority and to the west of the first ridgeline of the Diablo Range. Specific potential acquisition and improvement areas are listed within the Preliminary Engineer's Report.* Potential acquisition and improvement areas also include, but are not limited to, lands in the cities of Campbell, Milpitas, Morgan Hill, San Jose, Santa Clara, and in the unincorporated areas within the district.

Funds may also be used for the development, improvement or operation of open space and greenbelt lands acquired or controlled by the District.

The amount of the assessment per parcel is calculated based upon a formula which is summarized below and which is set out more particularly in a document entitled "Preliminary Engineer's Report – Section V, Method of Apportionment of Assessment" on file and available in the Office of the Clerk of the Board of Supervisors. Tenth Floor, East Wing, County Government Center, 70 West Hedding Street, San Jose, California, 95110.

The assessment is based upon a formula which takes into account benefit factors and the existing uses of parcels to be assessed. Each parcel will be assessed as attributable "benefit point" or "benefit points" according to the formula. Each benefit point will not exceed twelve dollars ($12.00) per year. The value attributed to the benefit point will remain constant for at least a five year period.

By example, a single family residential parcel will be assessed one (1) benefit point. The annual assessment will not exceed twelve dollars ($12.00) per year and will not be increased for a five year period.

By example, commercial and industrial properties will be assessed from one to not more than twenty-five (25) benefit points. Undeveloped and vacant properties, under the formula, will be assessed a smaller fraction of the assessment assigned to developed properties with similar uses. The maximum annual assessment will not exceed three hundred dollars ($300.00) per year over a five year period. Agriculture land will not be assessed.

Based upon the testimony heard and written communication considered, the Authority may make changes in the assessment methodology or the amount of the assessment prior to levying the assessment as long as the amount of the assessment is not increased.

A majority protest will cause the assessment to be abandoned. A protest majority exists if, upon conclusion of the hearing, written protests filed and not withdrawn represent property owners owning more than 50% of the area of assessable lands within the proposed district. Any property owner(s) who wishes to mail a written protest should send written communication to Office of the Clerk of the Board of Supervisors, Interim Governing Board of the Santa Clara County Open Space Authority, Tenth Floor, East Wing, County Government Center, 70 West Hedding Street, San Jose, California, 95110.

ALL INTERESTED PERSONS may appear and be heard at said time(s) and place(s). Written communications should be filed with the Office of the Clerk of the Board of Supervisors, Tenth Floor, East Wing, County Government Center, 70 West Hedding Street, San Jose, California, 95110, prior to the conclusion of the hearing. Questions concerning the aforementioned meeting and hearing should be directed to Greg Sellers, Staff Analyst, Interim Governing Board Santa Clara County Open Space Authority at (408) 252-8912.

SANTA CLARA COUNTY OPEN
SPACE AUTHORITY
/s/ Greg Sellers
Staff Analyst, Interim Governing Board
Santa Clara County Open Space
Authority

*Portions of the information contained within this public notice have been excerpted from the "Preliminary Engineer's Report." Full text of which is available to the public at the Office of the Clerk of the Board, Tenth Floor, County Government Center, 70 West Hedding Street, San Jose, California.

May 16, 23, 30, 1994

APPENDIX F

RESOLUTION NO. 94-8

A RESOLUTION OF THE BOARD OF THE SANTA CLARA COUNTY OPEN SPACE AUTHORITY CONFIRMING THE ENGINEER'S REPORT AND LEVYING THE ASSESSMENT FOR OPEN SPACE ACQUISITION AND MAINTENANCE DISTRICT NO. 1 FOR FISCAL YEAR 1994-95

WHEREAS, the Board of the Santa Clara County Open Space Authority did on the twenty-sixth day of April, 1994, adopt its Resolution of Intention No. 94-7 to order the improvements in connection with the assessment procedures for the formation of Open Space Acquisition and Maintenance District No. 1, which Resolution of Intention No. 94-7 duly and legally ordered in the time, form and manner as required by law, shown by the Affidavit of Publication on file in the office of the Clerk of said Authority; and

WHEREAS, said Board having duly received the considered evidence, oral and documentary concerning the formation of the district and levying of assessment in this preceding and concerning the necessity for the contemplated improvements and the benefits to be derived therefrom and said Board having now acquired jurisdiction to order the proposed improvements;

NOW, THEREFORE, BE IT RESOLVED THAT

1. The public interest and convenience requires the formation of an assessment district, and said Board hereby orders that the improvements, as set forth and

described in said Resolution of Intention No. 94-7 and the Engineers Report, be done and made; and

2. The report filed by the Engineer is hereby finally approved; and

3. The assessments for Fiscal Year 1994-95 and method of assessment in the Engineer's Report are hereby approved and said assessments are hereby levied.

APPROVED AND ADOPTED this 20th day of July, 1994, by the following vote:

AYES: McGuire, Estruth, Annable, Forst, Carrillo, and Fraser-Juarez
NOES: Baird
ABSTAIN: 0 (None)
ABSENT: 0 (None)

CHAIR /s/ J. Estruth
SANTA CLARA COUNTY OPEN SPACE AUTHORITY

ATTEST:

/s/ Cathy da la Silva
CLERK OF THE BOARD

APPROVED AS TO FORM AND LEGALITY:

/s/ Kathryn A. Berry
DEPUTY COUNTY COUNSEL

APPROVED AS TO FORM:

/s/ Illegible
SANTA CLARA COUNTY OPEN
SPACE AUTHORITY

The foregoing instrument is a
correct copy of the original
ATTEST: Phyllis A. Perez
Clerk of the Board

BY /s/ Myrna Baria
Deputy Clerk

Date: August 18, 1994

APPENDIX G

SANTA CLARA OPEN SPACE AUTHORITY PARK AND OPEN SPACE ASSESSMENT DISTRICT NO. 94-1

PROTEST SUMMARY

• Total number of parcels in Santa Clara County Open Space Authority boundaries	294,859 parcels
• Total estimated parcel acreage in Santa Clara County Open Space Authority boundaries	548,292.17 acres
• Total number of parcels in assessment district	279,028 parcels
• Total estimated parcel acreage in assessment district	191,964.73 acres
• Total number of "assessable" parcels in assessment district boundaries	268,984 parcels
• Total estimated acreage of assessable parcels in assessment district boundaries	182,256.84 acres
• Total valid protests received	2,032
• Total acreage of parcels protesting	39,245.06 acres
• Percent protest received	21.3%
• Total number of invalid protests received	
Protests from parcels east of ridgeline	400
Protests from parcels in City of Gilroy	68
Protests from parcels not shown in assessment roll	471
Duplicate protests received	196
Protests with no match in database	347

APPENDIX H

RESOLUTION NO. 94-6

A RESOLUTION OF THE INTERIM BOARD OF SANTA CLARA COUNTY OPEN SPACE AUTHORITY OF PRELIMINARY REVIEW AND RECEIPT OF THE ENGINEER'S REPORT FOR OPEN SPACE ACQUISITION AND MAINTENANCE DISTRICT NO. 1 FOR FISCAL YEAR 1994-95

WHEREAS, on the third day of March 1994, said Interim Board did adopt its Resolution No. 94-5 directing the Engineer of Work to make and file with the Authority's Clerk of the Board a report in writing as required by Sections 22565 and 22625 of the Streets and Highway Code known as the Landscaping and Lighting Act of 1972; and

WHEREAS, said Engineer of Work has made and filed with the Clerk of said Authority a report in writing as called for in said Resolution and under and pursuant to said Act, which report has been presented to this Interim Board for consideration; and

WHEREAS, said Interim Board has duly considered said report and each and every part thereof; and

WHEREAS, the plans and specifications show both existing and proposed improvements, including the general nature, location, and extent of the improvements.

WHEREAS, the Engineer's Estimate of the estimated costs and expenses of improvements per §22569 and of the incidental expenses in connection therewith, are contained in said report.

WHEREAS, the diagrams showing the Assessment District referred to and described in said report indicate the boundaries of the land within said Assessment District.

WHEREAS, the proposed assessment upon the land in said Assessment District, is in proportion to the estimated benefit to be received by said parcels, respectively, from said work and of the incidental expenses thereof, as contained in said report.

WHEREAS, the Interim Governing Board received input from the Citizens' Advisory Committee which offered for specific recommendations which resulted in changes made to the final draft of the Preliminary Engineer's Report which is the subject of approval by the Interim Board by this Resolution.

WHEREAS, said report shall stand as the Engineer's Report for the purposes of all subsequent proceedings, relevant to the proposed district.

NOW, THEREFORE, be it resolved as follows:

> The Interim Governing Board hereby approves the Engineer's Report and each aspect of it as modified, and hereby directs the Clerk to file the report in the Office of the Interim Board, and set a time for public meeting on the Report.

PASSED, APPROVED, AND ADOPTED this fourteenth day of April 1994, by the following vote:

AYES: Honda, Fernandes, Nadler, and Johnson

NOES: None

ABSTAIN: None

ABSENT: Livengood

/s/ Michael Honda
MICHAEL HONDA, CHAIRMAN,
INTERIM BOARD
SANTA CLARA COUNTY
OPEN SPACE AUTHORITY

ATTEST:

/s/ Myrna J. Baria
MYRNA J. BARIA, Deputy Clerk of the Board

APPROVED AS TO FORM:

/s/ Illegible
Santa Clara County Open Space Authority

APPROVED AS TO FORM AND LEGALITY:

/s/ Kathryn A. Berry
KATHRYN BERRY, Deputy County Counsel
Santa Clara County Open Space Authority

APPENDIX I

* * *

[p. 2] 3. LOCATION OF THE DISTRICT

The District shall be known as Open Space Acquisition and Maintenance District No. 1, and the improvements to be funded shall be located within the boundaries of the assessment district as shown on the diagram in the Engineer's Report.

4. DESCRIPTION OF ASSESSMENT DISTRICT

The Interim Governing board finds that the contemplated work is more specific and local than ordinary public benefit, and hereby orders the expense of the said improvements shall be chargeable upon the District, which said District is assessed to pay the costs and expenses thereof.

The district is described as follows:

a. All the certain territory within the boundaries of the authority excepting those parcels of land which are east of the western most ridgeline of the Diablo Range as shown on the records of the County Surveyor, included within the exterior boundary line shown upon that certain "Assessment Diagram Open Space Acquisition and Maintenance No. 1", heretofore approved by the Interim Board of said Authority by Resolution No. 94-6, indicating by said boundary line the extent of the territory included within the proposed assessment district and which map is on file in the office of the Clerk of the Board of said Authority.

b. Reference is hereby made to said map for further, full and more particular description of said assessment district, and the said map so on file shall govern all details as to the extent of said assessment district.

5. REPORT OF ENGINEER

The Interim Governing Board of said Authority by Resolution No. *94-6* has received and reviewed the report of the Engineer of Work which indicates the amount of the proposed assessment, the district boundary, assessment zones, detailed description of improvements and the method of assessment. The report titled "Engineer's Report for Open Space Acquisition and Maintenance District No. 1" is on file in the Office of the Clerk of said Authority, and was prepared for the 1994-95 Fiscal Year. Reference to said report is hereby made for all particulars for the amount and extent of the assessments and for the extent of the work. The Board hereby approves the Engineer's Report.

* * *

APPENDIX J

* * *

[p. 6] The appellant's property was used solely as a right-of-way for distributing and transmitting electrical energy. The City had published mere general notices relating to such assessments in the Daily Reporter, a newspaper published in Milwaukee County, which circulates only among professional and business men.

Appellant's address and place of business were well known to the City, but no attempt was made to give any actual notice, by mail or otherwise, with the result that appellant did not become aware of such assessments until the time for appeal as prescribed in the various applicable provisions of the Milwaukee City Charter, had expired. The properties in question were sold by the City to itself at tax sales upon failure of the appellant to pay the 1949 and 1950 assessments.

Appellant's primary contentions in its complaint are that (1) the notices published by the City in the Daily Reporter were entirely inadequate as they were not of such character as to create a reasonable presumption that the property owner will receive the information of what is proposed, and that (2) such notices were not mailed to the addresses of the various affected property owners, even though such addresses were readily at hand, and such mailing would not have imposed any great burden on the City; and thus the assessments were made without due process of law. It is appellant's contention that the assessments were void *ab initio* and should be set aside.

* * *

APPENDIX K

* * *

[p. 17] Minnesota, adopted its Resolution No. 464 levying special assessments for public improvements, said improvements including Sanitary Sewer Improvement No. 55-99, the aggregate assessments for said improvement being in the sum of $130,-600; that the assessment roll adopted by said resolution included the property of the petitioner described in paragraph I above and that the amount of the assessments levied by said resolution as set forth in said assessment roll against each of said blocks was as follows:

Block One,	"Meadowbrook Manor"	$11,800.50
Block Two,	"Meadowbrook Manor"	8,500.50
Block Three,	"Meadowbrook Manor"	11,800.50
Block Four,	"Meadowbrook Manor"	12,300.50
Total		$44,402.00

III.

That said Sanitary Sewer Improvement No. 55-99 had been duly ordered by the City Council of the said City of St. Louis Park by resolution adopted August 28 [*sic*; correctly August 29], 1955, after notice given in full compliance with Sections 429.011 through 429.041, Minnesota Revised Statutes, and that the improvement was duly constructed and the assessable cost thereof determined and ascertained in accordance with said statutes; that said Sanitary Sewer Improvement No. 55-99 was constructed by the City of

* * *

APPENDIX L

* * *

[p. 30] Let us look for a moment at the characteristics of the published notice in this case (R. 8-11). It was published once only; it does not name the owners of the properties to be assessed; it does not give the street addresses of the properties to be assessed; it does not even give a legal description of appellant's particular property. In the circumstances of today, when news is transmitted by newspapers, news magazines, radio and television, is this adequate notice, "reasonably calculated" to inform? Perhaps such published notice was adequate in the 19th century, when the only news source was the local newspaper, but it is not adequate today.

B. Mailed notice is effective and practical.

Some apprehension has been expressed that since the *Milwaukee* case, notices of special assessment hearing may have to be personally served on the property-owners concerned, which in many cases may be onerous if not actually impossible. This apprehension is, we think unfounded: The *Mullane* line of decisions generally endorse mailed notice (see part II of this argument).

We have already quoted *Mullane* to the effect that the mails today are an "efficient and inexpensive means of communication" (see above, part II). In *New York v. N. Y., N. H. & H. R. Co., supra,* the Court plainly said that notice of

* * *

APPENDIX M

* * *

[p. 13] paper publication alone did not measure up to the quality of notice required by the Due Process Clause of the Fourteenth Amendment, at least where the name of the party whose property was being condemned was known to the City and was on the official records.

The U. S. Supreme Court subsequently amended the *per curiam* opinion above quoted so as to remand the case not to the trial court but to the Wisconsin Supreme Court (352 U. S. 958). On the remand, the Wisconsin Supreme Court held in a *per curiam* opinion that "the constructive notice given by the defendant City by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process," citing the *Mullane* and *Walker* decisions. It therefore sent the case back to the trial court with instructions to overrule the City's demurrer. 275 Wis. 121, 81 N. W. 2d 298 (1957).

Here the appeals in the *Milwaukee* case ended, except for a further decision in 275 Wis. 436, 82 N. W. 2d 344 (1957), upon a point of procedure not involved in the instant case.

D. Developments since the Milwaukee case.

One of the first reactions of the *Milwaukee* case was upon the Wisconsin Legislature. In 1957 it amended the law generally used for the levy of special assessments by cities and villages. Prev- [p. 14] iously, this could be done upon published or posted notice; Chapter 130 of the *1957 Session Laws* required also that notice of the assessment hearing "be mailed to every interested person whose post office address is known, or can with reasonable diligence be ascertained, at least 10 days before the hearing or procedure."

The *Milwaukee* case has aroused considerable comment within the Municipal Law Section of the American Bar Association. Inside the back cover of this brief will be found photostatic reproductions of (a) pages 85-86 of that section's annual Committee Reports Supplement dated October, 1957 and (b) pages 95-96 of the same section's Committee Reports Supplement dated November, 1958. The program of the Municipal Law Section at the 1959 annual meeting of the ABA included a panel discussion of the *Milwaukee* case.

In Volume 3 of *Yokley on Municipal Corporations*, which was first published in 1958, the author states at page 435:

> "In the light of recent expressions by the Supreme Court of the United States, it may now be considered settled law that a constructive notice given by a city by publication of proposed special assessments against the lands of an owner thereof will not meet the requirements of due process. Where the only notice given by a city of a proposed special assessment consists of a publication in a newspaper of the assessment proceedings, a levy of special assessments will be

* * *

APPENDIX N

[p. 85] *SPECIAL ASSESSMENTS AND TAXING DISTRICTS*

1. *The Milwaukee Case*

In the opinion of the committee on Special Assessments and Taxing Districts one case decided in the past year is of far-reaching importance. The United States Supreme Court in Wisconsin Electric Power Company v. City of Milwaukee, 352 U.S. 948, stated:

"Appeal from the Supreme Court of Wisconsin.

"Facts and opinion, 272 Wis. 575, 76 N.W. 2d 341.

"Dec. 17, 1956. PER CURIAM. In this case probable jurisdiction is noted. The judgment of the Supreme Court of Wisconsin is vacated and the case is remanded to the Circuit Court for Milwaukee County for consideration in the light of Walker v. City of Hutchinson, 77 S. Ct. 200."

This opinion, superficially, does not seem very important. Its history and the citation of authority therein substantially alter this picture.

In the Walker case, decided one week before the Milwaukee case and cited therein, the United States Supreme Court reversed a Kansas District Court and the Kansas Supreme Court in a case concerning the condemnation of plaintiff's land by a city for opening, widening and extending a street and constructing a by-pass. The City commenced the condemnation proceedings in the district court and commissioners were appointed by it to fix compensation. Ten days' notice by publication of the time and place of their proceedings was given pursuant to statute. Plaintiff, an 82 year old Negro with the equivalent of a sixth grade education and a resident of the City, who owned the property since 1905, made no appearance; and his award was set aside by the commissioners with the city treasurer. After the expiration of the appeal period provided by statute, plaintiff alleged that he had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed. Without alleging that the award did not represent the fair value of his land, plaintiff sought to enjoin the city and its agents from entering or trespassing on the property. The Kansas courts denied relief, but the United States Supreme Court held that "newspaper publication alone xxx (does not measure) up to the quality of notice the Due Process Clause of the Fourteenth Amendment (of the federal Constitution) requires as a prerequisite to proceedings to fix compensation in condemnation cases" (77 S. Ct. at 202). (Parenthetical material added by us.)

The United States Supreme Court stated that "the right to a hearing is meaningless without notice" (p. 202), and that plaintiff's "name was known to the city and was on the official records" (p. 202), although just how and in what records is not clear, as plaintiff merely alleged the recording of the deed of conveyance in the county records and his post office address in the city. The Court cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, and stated (p. 202):

"That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognize that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown."

The Court noted that in an 1889 condemnation case it decided the land owner was a non-resident and that thus "we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the hulling decision" (p. 203), i.e. Hulling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559, 9 S. Ct. 603, 32 L. Ed. 1045 (1889). (The Municipal Law Service Letter (Vol. 6, No. 9, Nov., 1956) devoted a column to a discussion of the Walker case.)

In the Milwaukee case the United States Supreme Court subsequently amended its order quoted above and remanded the case not to the trial court but to the Wisconsin Supreme Court. That court then held last March that "In view of the determination made by the United States Supreme Court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process." Wisconsin Electric Power Company v. City of Milwaukee, 81 N.W. 2d 298 (1957).

About a month later the Wisconsin Supreme Court in the same case held that statutory provisions concerning general taxes were inapplicable to special assessments, and that the property owner did not have to pay the amount of the assessment within twenty days from the commencement of its appeal, as a condition to maintaining appeal proceedings. Thereupon the case was again remanded to the trial court "for further proceedings according to law." Wisconsin Electric Power Company v. City of Milwaukee, 82 N.W. 2d 344 (1957). Presumably the case is still pending.

[p. 86] 2. *Ramifications of The Milwaukee Case*

The ramifications of the Milwaukee case are far-reaching.

Mr. Justice Burton in his dissent in the Walker case, after noting his reluctance to reverse established precedents by holding that now as a constitutional matter notice by publication in condemnation proceedings was insufficient, stated that to do so would raise a cloud about the validity of numerous property titles acquired by condemnation. Similarly, the Milwaukee case possibly raises a question about the validity of numerous unpaid special assessments levied pursuant to statutes requiring a hearing on proposed assessments and notice thereof merely by publication, in reliance upon established precedents, e.g. Paulsen v. City of Portland, 149 U.S. 30 (1893).

As a general rule municipalities and other political or quasi-municipal subdivisions of a state have only those powers specifically granted by the legislature, necessarily implied thereby, and incidental thereto. Can assessments be validly levied under an act which requires a hearing to be held on proposed assessments but merely provides for notice by publication, even if the notice is in fact mailed?

How should notice be required to be given by statute, not only as a matter of legislative policy but also to assure a compliance with the minimal requirements of "due process?" Should a statute specifically permit notice to be given in one or more ways in addition to certain minimal requirements?

If the "notice required will vary the circumstances and conditions," as is suggested in the Walker case, how can a statutory procedure be prescribed which will meet all "circumstances and conditions?" What "circumstances and conditions," i.e. what facts, are relevant to giving notice and how are they to be ascertained by the officials of the public corporation levying the special assessments? What records must be searched and what other action must be taken to ascertain not only an accurate and sufficient description of each tract to be assessed, the last known owners thereof, and their last known addresses, but also possibly other facts, e.g. mental capacity or age, which would affect the type of notice required by "due process?" Are public officials safe in relying upon the names and addresses not necessarily available in the offices of the municipality or other public corporation levying the special assessments but generally available in county offices, e.g. the real property assessment rolls for general (ad valorem) taxes or the deeds and other real property instruments of public record in the office of the county recorder? If records of such a municipality or other public corporation must be searched, what records? Need records be searched if they are not arranged nor indexed according to the location of property, e.g. by lot, block and subdivision?

Frequently hundreds, and not infrequently thousands, of tracts or parcels of land are to be assessed to defray the cost of some local improvement program, and frequenty [sic] a large proportion of each of such tracts or parcels is owned by more than one owner. In fact, in community property states it would be unusual for there to be less than twice the number of owners as the number of such tracts or parcels. If a number of different records in both the county and the corporation levying the tax have to be searched under such circumstances, the already considerable costs of incidental expenses will be materially increased and probably included in the special assessments levied against the property of owners being protected by "due process."

If mailed notice is required, is its receipt by each owner of each tract assessed necessary to a valid levy? If so, must the municipality or other corporation send the notice by registered mail, return receipt requested, to personally serve each owner for perfecting its records so that several years after a levy is made it can refute any contention by any property owner that notice was not received by him through the mails nor in any other manner?

Under what circumstances, if any, is a hearing on assessments not constitutionally required, in which case the problem of sufficient notice would be moot? When is a legislative determination by a state or its subdivision binding on the judiciary not only in determining special benefits or the method of ascertaining such but also in actually levying assessments? Is a validating action in the nature of a class action necessary or desirable to resolve the ambiguities resulting from the Milwaukee case and will the validating action be binding upon those owners of property who are members of the class but who are not personally served in the class action?

The levy of special assessments is generally a legislative function frequently effected independent of any court proceedings. The valid levy of taxes, including general (ad valorem) taxers, special assessments, use charges, income taxes, estate and inheritance taxes, and various excise taxers, and their collection, are essential to the effective operation of public corporations for the public good. It is regrettable that established precedent is overruled and the validity of any type of tax, such as special assessments, is placed in doubt in jurisdiction after jurisdiction, thereby materially interfering with such operation to the public detriment. This committee questions whether it is in the public interest for the U.S. Supreme Court now to require at least mailed notice at least under certain circumstances in special assessment proceedings, thereby overruling prior cases, raising a question about the validity of numerous assessments previously levied and remaining unpaid, rendering uncertain the power to levy special assessments in many jurisdictions at least in the absence of statutory amendment, and perhaps making unmarketable for many public corporations bonds payable from assessments because of increased investor risk, thereby denying as a practical matter the power to finance the acquisition of badly needed improvements.

* * *

APPENDIX O

[p. 95] *SPECIAL ASSESSMENTS AND TAXING DISTRICTS*

1.

Ramifications of the Milwaukee Case

The last annual report of the committee on Special Assessments and Taxing Districts commented upon the decision of the United States Supreme Court in Wisconsin Electric Power Company v. City of Milwaukee, 352 U.S. 948, 77 S. Ct. 324. The case concerning the notice which is required by "due process" to be given of a hearing on special assessments, is subject to the interpretation placed upon it by the Wisconsin Supreme Court. That court held in March, 1957, that "In view of the determination made by the United States Supreme Court we hold that the constructive notice given by the defendant city by publication (but not by mail) of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process." Wisconsin Electric Power Company v. City of Milwaukee, 81 N.W. 2d 298 (1957).

The authorizing statutes in a number of states merely provide for published notice (1) of an organizational hearing or (2) of an assessment hearing, or both, but do not provide for mailed notice. Frequently, no opportunity has existed to amend such act.

Concern has been expressed because of the type of statement which appears in McQuillin, Municipal Corporations, 3rd Ed., Sec. 38.98:

"Although a contrary rule appears to obtain in some jurisdictions, according to the weight of authority a statute or charter provision authorizing special assessments, which fails to provide for notice to property owners and an opportunity to be heard at some stage of the proceedings is unconstitutional, as depriving persons of their property without 'due process of law.' "

Numerous cases are cited in that text in support of the statement, and those and other cases and texts contain similar statements.

Some attorneys, after restudying such cases in some detail, have concluded:

(1) That while enabling legislation might be invalid if it does not require a hearing to be held on the assessments somewhere in the course of the proceedings prescribed preliminary to and in the levy of special assessments and their foreclosure, it is not constitutionally necessary that the enabling legislation prescribe the notice of the hearing at all, nor in sufficient detail so as to meet the constitutional requirements;

(2) That if the enabling legislation does not require a notice to be given which is constitutionally sufficient, then the governing body of the political subdivision levying the special assessments has the implied power to provide for such notice at least by ordinance in the case of a municipality or by resolution in the case of a political subdivision which adopts legislation thereby;

(3) That in the cases in which the courts state that the enabling legislation is required by the due process clause to prescribe a notice, the word "notice" is actually

used as if it were synonymous with "hearing," a fact which is quite understandable, although somewhat confusing, because "notice" is an integral part of and a necessary antecedent to a proper "hearing;"

(4) That it is reasonably clear that the word "notice" is there used in such sense from the context of those cases and the fact situations there under consideration; and

(5) That there is not in fact, a clear line of authority holding that the enabling legislation must specifically authorize that notice which is constitutionally required, as distinguished from such a hearing. See, for example, Paulsen v. City of Portland, 149 U.S. 30, 13 S. Ct. 750 (1893); Londoner v. City and County of Denver, 210 U.S. 373, 28 S. Ct. 708, 713 and 714 (1908); and 1 Merill on Notice, Sec. 511 (1952).

In the opinion of this committee this analysis is accurate.

Actually there is substantial authority that if the enabling act requires the hearing which is constitutionally required, the political subdivision had the implied power to give the notice thereof which is constitutionally required without authorizing the manner of giving the notice by ordinance or resolution. So far as due process is concerned, the relevant question is "what notice was given," not "what notice is authorized (or required) to be given."

Some attorneys have opined that the validity of a special assessment depends upon whether or not the property owner actually received mailed notice of the hearing or otherwise had actual notice thereof. At least a majority of the committee believe that a political subdivision can meet the "due process" test by mailing notice properly addressed to the last known owner at his last known address as shown by city or county records, without the necessity of proving the receipt of mailed notice or showing actual notice, as under normal circumstances mailed notice "is reasonably calculated to inform parties of proceedings which may directly and adversely affect their (i.e. property owners') legally protected interests." Walker v. City of Mutchinson, 77 S. Ct. 200 at 202.

Clarification is desirable in another area of confusion raised by the Milwaukee case. As is indicated above, many statutes require an organizational hearing which is not constitutionally required and an assessment hearing which is constitutionaly required. There is substantial division of opinion, to the best of the knowledge of the committee members, as to whether published notice of the organizational hearing is sufficient.

One school of thought is that as the hearing is not constitutionally required, the notice of the hearing need not meet the test of due process. Another school of thought is that the United States Supreme Court has indicated that "the right to a hearing is meaningless without notice." and that "notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." 77 S. Ct. at 202. The Court makes no distinction as to whether such rights and interests are constitutionally created or merely created by statute. If such rights and interests are created, notice reasonably calculated to inform is required by "due process" as interpreted by the present United States Supreme Court.

There is a tendency to construe the Milwaukee case as requiring mailed notice of an assessment hearing.

The United States Supreme Court, however, cited the Walker case in the Milwaukee case, and in the former case after citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, stated (p. 202 of 17 S. Ct.):

"That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. *We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions.* We recognize that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown." (Emphasis added by committee.)

This committee is still puzzled by the following type of questions.

How should notice be required to be given by statute, not only as a matter of legislative policy but also to assure a compliance with the minimal requirements of "due process?" Should a statute specifically authorize notice to be given in one or more ways in addition to certain minimal requirements?

If the "notice required will very [sic] with circumstances and conditions," how can a statutory procedure be prescribed which will meet all "circumstances and conditions?" What "circumstances and conditions," i.e. what facts, are relevant to giving notice, and how are they to be ascertained by the officials of the public corporation levying the special assessments? What records must be searched and what other action must be taken to ascertain not only an accurate and sufficient description of each tract to be assessed, the last known owners thereof, and their last known addresses, but also possibly other facts, e.g. mental capacity or age, which would affect the type of notice required by "due process?" Are municipal officials safe in relying upon the names and addresses not necessarily available in the office of the municipality but generally available in county offices, e.g. the real property assessment rolls for general (ad valorem) taxes or the deeds and other real property instruments of public record in the office of the county recorder? If records of the municipality or other public corporation must be searched, what records? Need records be searched if they are not arranged nor indexed according to the location of property, e.g. by lot, block and subdivision?

This committee is sympathetic with the Court's desire to protect an individual's rights, but the procedure required therefor must not be made so cumbersome and costly as to a large extent to destroy as a practical matter the power to defray the cost of local improvements by the levy of special assessments. The loss of such power will materially inhibit the acquisition of local improvements at a time when urban areas are rapidly expanding and the need for local improvements is great. Such a loss is hardly in the public interest.

2.

New Legislation

Although a relatively small number of legislatures met early in the calendar year of 1958 for the adoption of general legislation, the following enactments are noted.

In Indiana Senate Bill 211 (Chapter 308), approved March 11, 1957, provided for the organization of conservancy districts for local improvements for water, drainage and sewerage purposes. Petitions for organization are to be filed in the circuit court of the County, containing the most land. Notice is given by service on residents, posting and mailing notices to non-residents. The court appoints a board of three or more directors. The Board of Directors shall submit plans to the Court. On approval of the plan the Board can levy taxes on real property, make assessments for exceptional benefits to real property, issue bonds, have the power of eminent domain, etc. Where assessments for benefits are made, an assessment roll shall be filed and notice published.

Section 727.01 of the Ohio Code was amended to authorize special assessments for off street parking. No assessments can be levied against land used for off street parking or land used solely for single or two family dwellings. Reasonable fees may be imposed upon users for maintaining, operating and regulating the same, and recovery of the cost of acquiring and improving the same derived from funds other than those collected by special assessment.

As a result of the decisions in Wisconsin Power Company v. City of Milwaukee, 352 U.S. 918, and Walker v. City of Hutchinson, 77 S. Ct. 200, the Illinois Legislature by House Bill 1358 amended the Illinois Drainage Code requiring Drainage Districts in making assessments, in addition to publication of notice, to mail to each property owner or last taxpayer a notice of a hearing. The Code provided publication for residents and mailing only for non residents. Service of process is required when land is taken. The notice now required by the Illinois Drainage Code for eminent domain and assessments by

* * *